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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 22

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NINA KINSELLA, WARDEN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA
*ex Rel.* ALBERTA SINGLETON

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

---

# BRIEF FOR THE APPELLEE

---

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## INDEX


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Constitutional Provisions and Statutes Involved | 2 |
| Statement | 2 |
| Summary of Argument | 7 |
| Argument | 16 |
| I. Fairly construed, Article 2(11) of the Uniform Code of Military Justice Is Separable, So That the Constitutional Issue in This Case Must Be Decided | 16 |
| A. Although the cases now before the Court involve two different separability clauses, the points they present are, with one exception, plainly separable even on a literal reading of those clauses | 17 |
| B. Read in the light of other legislation, both separability clauses must be given the same broad effect, so that every application of Article 2(11) is separable | 20 |
| C. It follows that the constitutional question in this case must be decided | 22 |
| II. The Prerequisite to the Exercise of Military Jurisdiction Is That the Accused Have a Military Status, and Consequently (With a Narrow Wartime Exception Not Here Applicable), No Civilian Can Constitutionally Be Tried by Court-martial Regardless of the Nature or Quantum of the Offense With Which He (or She) Is Charged | 24 |
| A. The holding of the Court in *Reid* v. *Covert* forecloses a whole collection of subsidiary contentions still advanced by the Government | 24 |

Page

B. The inapplicable exception here is the unquestioned power to subject to trial by court-martial civilians who in time of war are with the armed forces "in the field," that is, at a time when and at a place where military operations are carried on ..... 28

C. Military jurisdiction depends on military status, and not on the nature of the offense charged ..... 34

1. Military jurisdiction depends upon military status ..... 35

2. A differentiation between capital and non-capital offenses is appropriate only in a due process setting, involving the exercise of an admitted power, but entirely inappropriate here, where the question is whether a particular power exists at all ..... 39

D. The purported distinction between capital and non-capital offenses as a criterion of military jurisdiction over civilian dependents is untenable on numerous grounds ..... 43

1. The purported jurisdictional distinction cannot be found in the Constitution ..... 43

2. The purported jurisdictional distinction is untenable as a matter of history ..... 46

3. The purported jurisdictional distinction is untenable in the light of earlier tests of military jurisdiction ..... 49

4. The purported jurisdictional distinction is untenable in the context of the Uniform Code of Military Justice ..... 51

Page

5. The Government in several cases decided subsequent to *Reid* v. *Covert* has acted on the assumption that the purported jurisdictional distinction is untenable ..... 55

E. Historical materials emphasize the lack of foundation for military jurisdiction over civilian dependents in time of peace ..... 57

1. No civilian dependents were ever tried by an American court-martial under the Constitution prior to 1950 ..... 58

2. The English precedents do not reflect any wider jurisdiction ..... 68

F. On no permissible view of its scope does the Necessary and Proper Clause expand Clause 14 so as to include civilian dependents within or as a part of the "land and naval Forces" so as to render them subject to military jurisdiction in time of peace ..... 81

1. Even if Clause 14 is to be considered as incorporating Clause 18, the combination of both is still amended and limited by the guarantees of jury trial in the Bill of Rights ..... 82

2. In view of the widespread hostility to standing armies at the time of the adoption and ratification of the Constitution, it is plain that the Founders did not intend to confer upon the new Government any power to court-martial dependents in time of peace ..... 87

Page

3. The circumstance that, for more than a century and a half after the ratification of the Constitution, no American military lawyer ever invoked the Necessary and Proper Clause to support peacetime military jurisdiction over civilian dependents is well-nigh conclusive against such a basis for that jurisdiction now ..... 96

III. The Government's Arguments as to the Alleged Necessity of Trying Civilian Dependents by Court-Martial and the Alleged Lack of Practical Alternatives Are Incomplete to the Point of Being Misleading ..... 103

A. The Government omits to advise the Court that, under the NATO and NATO-type agreements, primary jurisdiction over American civilian dependents has been conceded to the foreign nations where such dependents are stationed ..... 104

B. The Government omits to advise the Court that at least one American civilian dependent has been turned over to the German courts for trial ..... 105

C. The Government omits to explain why, after successfully persuading this Court to permit it to turn over the soldier Girard to the Japanese authorities for trial in a Japanese court, the possibility of similar trials in foreign courts for civilian dependents is an "unacceptable alternative" ..... 106

D. The Government fails to explain why practical necessities require it to try by court-martial civilian dependents charged with manslaughter and why there are no acceptable alternatives for military trials of such cases, while at the same time the Government has been able, without demonstrable inconvenience, to withhold from trying in a military court civilian dependents charged with premeditated murder ..... 107

E. The Court should call on the Government for production of recent arrangements with foreign countries apparently at variance with the representations now made ..... 108

F. The claim to exercise military jurisdiction over civilian dependents is simply a naked assertion of power ..... 109

Conclusion ..... 110

APPENDIX A—

Glossary of Military Law Abbreviations and Short Titles of Works Frequently Cited ..... 111

I. Short Titles ..... 111

II. Military Law Abbreviations ..... 111

APPENDIX B—

Statutes Involved ..... 113

APPENDIX C—

Summary of the Punitive Provisions of the Earliest American Military Codes ..... 116

I. The 1776 Articles of War as amended in 1786 ..... 116

II. The 1806 Articles of War ..... 118

AUTHORITIES

JUDICIAL DECISIONS:

*Abbate* v. *United States*, 359 U.S. 187 ..... 14, 96
*Abrams* v. *United States*, 250 U.S. 616 ..... 85
*Andres* v. *United States*, 333 U.S. 740 ..... 56, 84
*Balzac* v. *Porto Rico*, 258 U.S. 298 ..... 72
*Barron* v. *Baltimore*, 7 Pet. 243 ..... 82
*Barwis* v. *Keppel*, 2 Wils. K.B. 314 ..... 71
*In re Berue*, 54 F. Supp. 252 ..... 32, 33
*Betts* v. *Brady*, 316 U.S. 455 ..... 9, 42
*Billings* v. *Truesdell*, 321 U.S. 542 ..... 35
*In re Bogart*, 2 Sawy. 396, Fed. Case No. 1596 ..... 101
*Bowen* v. *Johnston*, 306 U.S. 19 ..... 30
*Brown* v. *Mississippi*, 297 U.S. 278 ..... 41
*Bullock* v. *United States*, 122 F. 2d 213 ..... 54
*Burns* v. *Wilson*, 346 U.S. 137, 346 U.S. 844 ..... 49, 50
*Burrow-Giles Co.* v. *Sarony*, 111 U.S. 53 ..... 95
*Callan* v. *Wilson*, 127 U.S. 540 ..... 84, 95
*Carter* v. *McClaughry*, 183 U.S. 365 ..... 50
*Carter* v. *Roberts*, 177 U.S. 496 ..... 10, 50
*Chambers* v. *Florida*, 309 U.S. 227 ..... 41
*Emma Cheaves* v. *Wilber M. Brucker, Secretary of the Army*, D.D.C., H.C. No. 100-58 ..... 55, 105
*Chessman* v. *Teets*, 354 U.S. 156 ..... 41
*Re Claasen*, 140 U.S. 200 ..... 43
*Coler* v. *Corn Exchange Bank*, 250 N.Y. 136, 164 N.E. 882 ..... 95
*Crowell* v. *Benson*, 285 U.S. 22 ..... 35
*Darcy* v. *Handy*, 351 U.S. 454 ..... 41
*In re Debs*, 158 U.S. 564 ..... 96
*Debs* v. *United States*, 249 U.S. 211 ..... 85
*In re Di Bartolo*, 50 F. Supp. 929 ..... 33
*District of Columbia* v. *Clawans*, 300 U.S. 617 ..... 96
*District of Columbia* v. *Colts*, 282 U.S. 63 ..... 84, 96
*Dorchy* v. *Kansas*, 264 U.S. 286 ..... 7, 22
*Duke* v. *United States*, 301 U.S. 492 ..... 43
*Duncan* v. *Kahanamoku*, 327 U.S. 304 ..... 77, 96
*Dynes* v. *Hoover*, 20 How. 65 ..... 9, 35
*Ex parte Falls*, 251 Fed. 415 ..... 33, 101
*Francis* v. *Resweber*, 329 U.S. 459 ..... 41

*Franke* v. *Murray*, 248 Fed. 865 ..... 35
*Frohwerk* v. *United States*, 249 U.S. 204 ..... 85
*Ex parte Gerlach*, 247 Fed. 616 ..... 33
*Gibbs* v. *Burke*, 337 U.S. 773 ..... 9, 42
*Gibson* v. *United States*, 329 U.S. 338 ..... 9, 36
*Gompers* v. *United States*, 233 U.S. 604 ..... 41, 69
*Grafton* v. *United States*, 206 U.S. 333 ..... 49, 50
*Green* v. *United States*, 356 U.S. 165 ..... 13, 84, 96
*In re Grimley*, 137 U.S. 147 ..... 9, 35, 36
*Grosjean* v. *American Press Co.*, 297 U.S. 233 ..... 69
*Hampton & Co.* v. *United States*, 276 U.S. 394 ..... 95
*Hertz* v. *Woodman*, 218 U.S. 205 ..... 49
*Hiatt* v. *Brown*, 339 U.S. 103 ..... 30
*Hines* v. *Mikell*, 259 Fed. 28; certiorari denied, 250 U.S. 645 ..... 32, 33
*Madelyn E. Hitt* v. *Neil H. McElroy, Secretary of Defense*, D.D.C., H.C. No. 29-58 ..... 56
*Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398 ..... 9, 40
*Houston* v. *Moore*, 5 Wheat. 1 ..... 36
*Humphrey* v. *Smith*, 336 U.S. 695 ..... 30
*Ex parte Jochen*, 257 Fed. 200 ..... 32, 33
*Johnson* v. *Zerbst*, 304 U.S. 458 ..... 49, 50
*Jones* v. *United States*, 175 F. 2d 544 ..... 54
*Keller* v. *United States*, 213 U.S. 138 ..... 85
*Kinsella* v. *Krueger*, 351 U.S. 470 ..... 39
*Kronberg* v. *Hale*, 180 F. 2d 128, certiorari denied, 339 U.S. 969 ..... 101
*Lee* v. *Madigan*, 358 U.S. 228 ..... 13, 49, 96
*Lisenba* v. *California*, 314 U.S. 219 ..... 41
*Lochner* v. *New York*, 198 U.S. 45 ..... 107
*Madsen* v. *Kinsella*, 343 U.S. 341 ..... 67, 77, 79, 80
*Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228 ..... 32
*Martin* v. *Mott*, 12 Wheat. 19 ..... 36
*Ex parte Mason*, 105 U.S. 696 ..... 49
*McCune* v. *Kilpatrick*, 53 F. Supp. 80 ..... 33
*M'Culloch* v. *Maryland*, 4 Wheat. 316 ..... 14, 84, 98, 102
*McKinley* v. *United States*, 249 U.S. 399 ..... 85
*Ex parte Milligan*, 4 Wall. 2 ..... 96, 99
*Murray* v. *Hoboken Land Co.*, 18 How. 272 ..... 95

*Nebbia* v. *New York*, 291 U.S. 502 ..... 58
*Orloff* v. *Willoughby*, 345 U.S. 83 ..... 9, 35
*Patterson* v. *Lamb*, 329 U.S. 539 ..... 36
*Patton* v. *United States*, 281 U.S. 276 ..... 84
*Perlstein* v. *United States*, 151 F. 2d 167, certiorari granted, 327 U.S. 777, and dismissed because moot, 328 U.S. 822 ..... 33
*Powell* v. *Alabama*, 287 U.S. 45 ..... 9, 41, 42, 69
*Petition of Provoo*, 17 F.R.D. 183, affirmed, 350 U.S. 857 ..... 50
*Ex parte Quirin*, 317 U.S. 1 ..... 96
*Rassmussen* v. *United States*, 197 U.S. 516 ..... 21, 84
*Reece* v. *Georgia*, 350 U.S. 85 ..... 41
*Reid* v. *Covert*, 354 U.S. 1 ..... 6-8, 11-12, 19, 22-26, 28, 30, 32, 34, 38, 41, 45, 53, 55, 72, 80, 83, 96, 99, 107
*Reid* v. *Covert*, 351 U.S. 487 ..... 39
*Schaefer* v. *United States*, 251 U.S. 466 ..... 85
*Schenck* v. *United States*, 249 U.S. 47 ..... 85
*Smith* v. *Baldi*, 344 U.S. 561 ..... 41
*Louise Smith* v. *Kinsella*, S.D. W. Va., H.C. No. 1963 ..... 6, 55
*State* v. *Howat*, 116 Kan. 412, 227 Pac. 752, affirmed *sub nom. Dorchy* v. *Kansas*, 272 U.S. 306 ..... 22
*Stein* v. *New York*, 346 U.S. 156 ..... 41
*Stout* v. *Hancock*, 146 F. 2d 741, certiorari denied, 325 U.S. 850 ..... 99
*Stuart* v. *Laird*, 1 Cranch 299 ..... 95
*Talbott* v. *United States ex rel. Toth*, 215 F. 2d 22 101
*Thompson* v. *Utah*, 170 U.S. 343 ..... 84
*Toth* v. *Quarles*, 350 U.S. 11 ..... 8, 12, 14, 28, 80, 96, 99, 103
*United States* v. *Automobile Workers*, 352 U.S. 567 ..... 23
*United States* v. *Bledsoe*, 152 F. Supp. 343, affirmed, 245 F. 2d 955 ..... 100
*United States* v. *Cooke*, 336 U.S. 210 ..... 12, 30, 80
*United States* v. *Harriss*, 347 U.S. 612 ..... 23
*United States* v. *Kinsella*, 137 F. Supp. 806 ..... 6

Page

*United States* v. *Moreland*, 258 U.S. 433 ..... 43
*United States* v. *Pink*, 315 U.S. 203 ..... 49
*United States* v. *Plenty Horses*, D. So. Dak., Winthrop 1212 ..... 31
*United States* v. *Procoo*, 215 F. 2d 531 ..... 50
*United States* v. *Standard Oil Co.*, 332 U.S. 301 ..... 9, 35
*United States* v. *Williams*, 302 U.S. 46 ..... 9, 35
*Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474 ..... 21
*In re Varney's Petition*, 141 F. Supp. 190 ..... 30
*Whelchel* v. *McDonald*, 340 U.S. 122 ..... 96
*White* v. *United States*, 270 U.S. 175 ..... 9, 35
*Williams* v. *Bruffy*, 96 U.S. 176 ..... 78
*Wilson* v. *Girard*, 354 U.S. 524 ..... 15, 27, 106, 107
*Wilson* v. *New*, 243 U.S. 332 ..... 9, 23, 40
*Wolff Packing Co.* v. *Court of Industrial Relations*, 262 U.S. 522 ..... 58
*Wolton* v. *Gavin*, 16 Q.B. 48 ..... 78
*Wong Wing* v. *United States*, 163 U.S. 228 ..... 43
*In re Yokoyama*, 170 F. Supp. 467 ..... 30

CONSTITUTION OF THE UNITED STATES:

Art. I, Sec. 8:
Clause 14 ..... 8, 10, 12-13, 33, 35, 39, 41, 45, 49, 71, 81, 82, 84, 89, 94, 96, 102
Clause 15 ..... 89-90
Clause 16 ..... 89-90
Clause 18 ..... 12-13, 81-86, 89, 94, 96, 102
Art. III ..... 9
Art. III, Sec. 2 ..... 84
First Amendment ..... 69, 85
Fifth Amendment ..... 26, 39, 43, 101
Sixth Amendment ..... 39, 83, 84
Fourteenth Amendment ..... 39, 42, 69

OTHER ORGANIC LAWS OF THE UNITED STATES:

Articles of Confederation, Art. IX, ¶4 ..... 70
Northwest Ordinance ..... 13, 90, 91, 93

Page

STATUTES:

(1) Acts by Date and Name
Act of Sept. 29, 1789, c. 25, 1 Stat. 95 ..... 89
Act of April 30, 1790, c. 10, 1 Stat. 119 ..... 89
Act of May 30, 1796, c. 39, 1 Stat. 483 ..... 63
Act of March 16, 1802, c. 9, 2 Stat. 132 ..... 59
Act of May 29, 1830, c. 183, 4 Stat. 418 ..... 47
Act of March 3, 1863, c. 75, 12 Stat. 731 .... 49
Act of June 18, 1878, c. 263, 20 Stat. 145 .... 59
Jt. Res. of July 25, 1947, 61 Stat. 449 ..... 65
Act of May 5, 1950, c. 169, 64 Stat. 107 ..... 17, 18
Act of Aug. 1, 1956, c. 852, 70 Stat. 908 ....21, 22, 115
Act of Aug. 10, 1956, c. 1041, 70A Stat. 1 .... 17, 20
Act of June 25, 1959, P. L. 86-70, 73 Stat. 141 ..... 21, 115
Revised Statutes:
§1240 ..... 59
§1295 ..... 59

(2) United States Code:
(exclusive of cross-references to UCMJ: old Title 50, new Title 10)
10 U.S.C. §501 ..... 38
10 U.S.C. [1926-1952 eds.] §664 ..... 59
18 U.S.C. §7 ..... 56
18 U.S.C. §1111 ..... 56
32 U.S.C. §304 ..... 38

(3) Articles of War:
1775 (2 J. Cont. Cong. 111)
Art. XXXII ..... 28, 113
1776 (5 J. Cont. Cong. 788)
Sec. VI, Arts. 1 and 3 ..... 46
Sec. X, Art. 1 ..... 48
Sec. XIII, Art. 23 ..... 28, 47, 70, 113
Sec. XVIII, Art. 3 ..... 48
Punitive provisions generally ..... 116-118
1786 (30 J. Cont. Cong. 316)
AW 4 ..... 47
AW 10 ..... 48
AW 24 ..... 48
AW 26 ..... 48

Page

1806 (Act of April 10, 1806, c. 20, 2 Stat. 359)
AW 20 ..... 47
AW 22 ..... 47
AW 33 ..... 48
AW 60 ..... 29, 47, 113
AW 67 ..... 47
AW 74 ..... 48
AW 87 ..... 48
AW 92 ..... 48
Punitive provisions generally ..... 118-121
1874 (R.S. §1342)
AW 58 ..... 49
AW 63 ..... 19, 29, 113
1916 through 1948 (Sec. 3, Act of Aug. 29, 1916, c. 418, 39 Stat. 619, 650; Ch. II, Act of June 4, 1920, c. 227, 41 Stat. 759, 787; Tit. II, Act of June 24, 1948, c. 625, 62 Stat. 604, 627)
AW 2(d) ..... 19, 29, 65, 99, 114
AW 93 ..... 49

(4) Uniform Code of Military Justice (Act of May 5, 1950, c. 169, 64 Stat. 108, formerly 50 U.S.C. §§551-736; chap. 47, Act of Aug. 10, 1956, c. 1041, 70A Stat. 1, 36, 10 U.S.C. §§801-940)
Art. 1 ..... 17
Art. 2(4) ..... 100
Art. 2(6) ..... 100
Art. 2(10) ..... 8, 28, 32, 33, 59, 79, 114, 115
Art. 2(11) ..... 7, 16, 19-23, 45, 60, 99, 100, 114, 115
Art. 3(a) ..... 100
Art. 36(a) ..... 54
Art. 49(f) ..... 52, 55
Art. 63(b) ..... 53
Art. 66 ..... 5
Art. 67(b)(2) ..... 5, 55
Art. 81 ..... 44
Art. 110a ..... 52

Page

Art. 118 ..... 51, 56, 115
Art. 118(1) ..... 51, 52, 54, 108, 115
Art. 118(2) ..... 3, 43, 51, 53, 54, 56, 108, 115
Art. 118(3) ..... 51, 115
Art. 118(4) ..... 51, 115
Art. 119 ..... 3, 44, 51, 54, 108
Art. 119(b) ..... 3
Art. 120(a) ..... 108
Art. 120(b) ..... 108
Art. 121 ..... 44
Art. 125 ..... 44
Art. 134 ..... 44

(5) British Statutes:

The Air Force Act, 1955 (St. 3 & 4 Eliz. II, c. 19) ..... 79
Army Act, 1881 (St. 44 & 45 Vich. c. 58) 78
Army Act, 1951, §§175(7), 176(10), 189(1) ..... 78-79
The Army Act, 1955 (St. 3 & 4 Eliz. II, c. 18) ..... 79
Army Discipline and Regulation Act (St. 42 & 43 Vict., c. 33) ..... 78
St. 5 Geo. III, c. 12 ..... 93
St. 5 Geo. III, c. 33 ..... 12, 72, 93
St. 6 Geo. III, c. 18 ..... 74
St. 9 Geo. III, c. 18 ..... 74
St. 43 Geo. III, c. 20 ..... 71
St. 53 Geo. III, c. 17 ..... 71
St. 4 Geo. IV, c. 81 ..... 80
St. 6 & 7 Will. IV, c. 114 ..... 69

(6) Miscellaneous Statutes:

Res. of Nov. 16, 1779, 13 J. Cont. Cong. 1277 ..... 48
1 Stat. Ohio & N.W. Terr. (Salmon P. Chase ed. 1833) 97-101 ..... 94
Art. 13 of the Virginia Bill of Rights (9 Hening, Stat. 109) ..... 58

Page

TREATIES AND EXECUTIVE AGREEMENTS:

Amendment of Art. XVII of Administrative Agreement with Japan, TIAS 2648, 4 U.S.T. 1846 ..... 105
NATO Status of Forces Agreement, TIAS 2846, 4 U.S.T. 1792:
Art. I ..... 104
Art. VII(3) ..... 14, 104
Defense Agreement with Spain, TIAS 2850, 4 U.S.T. 1895 ..... 108

LEGISLATIVE MATERIALS:

15 Annals of Congress 326, 327, 338 ..... 47
56 Cong. Rec. 5120, 5401-5402, 5471-5472 ..... 86
House Hearings on UCMJ, pp. 875-877 ..... 19, 37
H.R. Rep. 491, 81st Cong., 1st sess., p. 11 ..... 32
H.R. Rep. 970, 84th Cong., 1st sess., p. 55 ..... 28
3 J. Cont. Cong. 277 ..... 70
27 J. Cont. Cong. 518 ..... 87
27 J. Cont. Cong. 524 ..... 88
31 J. Cont. Cong. 490 ..... 92
32 J. Cont. Cong. 327-332 ..... 90
*id.* 330 ..... 90
*id.* 334 ..... 91
*id.* 370 ..... 91
*id.* 374 ..... 91
*id.* 376, 385-387 ..... 92
*id.* 440-441 ..... 92
S. 4364, 65th Cong., 2d sess. ..... 86
S. Rep. 130, 64th Cong., 1st sess. ..... 19
S. Rep. 486, 81st Cong., 1st sess., p. 7 ..... 32
S. Rep. 2484, 84th Cong., 2d sess., p. 66 ..... 28
S. Rep. 2484, 84th Cong., 2d sess., p. 1020 ..... 59

MILITARY MATERIALS:

Board of Review Cases:
*Brillhart, Eunice M.*, CM 376967, review denied, 6 USCMA 808 ..... 52, 53
*Tyler, Cynthia P.*, CM 396739 ..... 53, 54, 55
4 Bull. JAG 223-229 ..... 32, 65

Page.

Court of Military Appeals Cases:
*Burney*, 6 USCMA 776 ..... 31
*McMahan*, 6 USCMA 709 ..... 54
*Sechler*, 3 USCMA 363 ..... 54
Dig. Op. JAG, 1880, pp. 48-49 ..... 29, 31-32
Dig. Op. JAG, 1895:
pp. 67-69 ..... 48
pp. 75-77 ..... 29, 31-32
Dig. Op. JAG, 1901, pp. 56-58 ..... 29, 31-32
Dig. Op. JAG, 1912, pp. 151-152 ..... 29, 31
G.O. 22 of 1833 ..... 48
Manual for Courts-Martial, 1951:
¶15(*a*)(2) ..... 51, 55
¶15(*a*)(3) ..... 11, 51, 53
p. 219 ..... 44
p. 223 ..... 4, 44, 52
p. 225 ..... 44
p. 226 ..... 44
2 Op. JAG (1918) 243-245 ..... 32

Order Books:
Corps of Artillerists and Engineers (MS., U.S.M.A.) ..... 60
Wayne Orderly Books:
34 Mich. Pion. & Hist. Soc. Coll. 341 ..... 47, 61
MS., Hist. Soc. Pa. ..... 47, 61
Wilkinson Order Book (MS., Nat. Arch.) ..... 47, 61-64

British Military Materials

Articles of War:
Sec. XIV, Art. XXIII, of 1765 ..... 70
Sec. 14, Art. 23, of 1774 ..... 70
Manual of Military Law, 1929 ed., pp. 12-14 ..... 71
Manual of Military Law, 1951 ed., pp. 392, 395, 414 ..... 79

Treatises and Articles:
2 *The John Askin Papers* (Quaife ed. 1931), pp. 112-114 ..... 63
pp. 115-117, 118-119 ..... 64
p. 165, note 66 ..... 64

Page

Aycock & Wurfel, *Military Law Under the Uniform Code of Military Justice*, 60 ..... 65
Blumenthal, *Women Camp Followers of the American Revolution*, 42 ..... 77
*Burton Hist. Coll. Leaflet*, 1922, No. 3 ..... 63
4 Churchill, 4 *History of the English Speaking Peoples*, 87 ..... 81
Clode, *The Administration of Justice Under Military and Martial Law* (2d ed. 1874) 94, 95 ..... 74-75
Clode, *Military Forces of the Crown* ..... 74
1 *Campaign into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence*, 81 ..... 47
Davis, *A Treatise on the Military Law of the United States:*
pp. 52-53 ..... 97
pp. 340-341 ..... 70
pp. 478-479 ..... 97
12 Dict. Amer. Biog. 344 ..... 88
Dudley, *Military Law and the Procedure of Courts-Martial*, 413-414 ..... 97
Elliot's *Debates:*
Vol. 1, pp. 323, 326, 328, 334-446 ..... 88, 89, 94
Vol. 2, pp. 177, 658 ..... 94
Vol. 3, pp. 47-48, 51-52, 169, 410 *et seq.* ..... 90
p. 552 ..... 89
p. 660 ..... 88, 89
Vol. 4, pp. 243-245 ..... 88, 89, 94
Vol. 5, pp. 442-443 ..... 87
Farrand, *The Framing of the Constitution* ..... 90
Farrand, *Records of the Federal Convention:*
Vol. 2, pp. 323, 329, 330 ..... 88
p. 640 ..... 88
Vol. 3, pp. 207-209 ..... 88, 90
*The Federalist*, No. 24 ..... 87
Force, *American Archives*, Fourth Series, Vol. II, p. 970 ..... 76
Heitman, *Historical Register and Dictionary of the United States Army* ..... 60

| | Page |
|---|---|
| 1 *Holmes-Laski Letters*, 304 | 32 |
| 1 *Holmes-Pollock Letters*, 34 | 32 |
| *Journal of William Maclay* (1927 ed.) 224, 235 | 89 |
| Knox, *A History of the United States Navy* (1948 ed.) 44 | 46 |
| Lee, *The Judge Advocate's Vade Mecum*, 22 | 65 |
| *New Legal Era for Troops and Dependents in Germany*, Army Navy-AF Register, Aug. 15, 1959, p. 11 | 109 |
| O'Donnell, *The American Invasion of Spain*, Sat. Eve. Post, Jan. 28, 1956, pp. 26, 88 | 109 |
| Oppenheimer, *Infamous Crimes and the Moreland Case*, 36 Harv. L. Rev. 299 | 43 |
| Orwell, *Nineteen Eighty-Four*, 41 | 98 |
| 12 *Papers of Thomas Jefferson*, 438, 440 | 88 |
| 13 *id.* 440, 442, 443 | 88 |
| 14 *Proc. Mass. Hist. Soc.*, 2d series, 325 | 85 |
| Rankin, *When Civil Law Fails*, 138-139 | 86 |
| Samuel, *Historical Account of the British Army and of the Law Military*, 691-692 | 75 |
| *W. Sargent Diary of the St. Clair Campaign*, 33 Ohio Arch. & Hist. Soc. Proc. 247-248 | 47 |
| 2 W. H. Smith, *The St. Clair Papers*, 249, 255 | 47 |
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| Territorial Papers of the United States: | |
| Vol. 2, p. 19 | 92 |
| p. 39 | 91 |
| pp. 56-57 | 92 |
| p. 133 | 94 |
| Vol. 3, pp. 20-21 | 64 |
| p. 263 | 93-94 |
| Warren, *The Making of the Constitution*, 482-484 | 88 |
| Washburn, *The Governor and the Rebel*, 89-91 | 58 |
| Wildes, *Anthony Wayne*, 361 | 61 |

Page

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p. *53 ..... 101
pp. *131-*138 ..... 19, 32, 64
pp. *143-*146 ..... 34, 97, 99
p. *973 ..... 50
p. *1275 ..... 99
*Works of John Adams:*
Vol. 1, p. 188 ..... 70
Vol. 3, pp. 68-69, 83-84 ..... 69-70

MISCELLANEOUS:

1 Am. St. Pap. Mil. Aff. 6 ..... 46
71 Harv. L. Rev. 713 ..... 57
72 Harv. L. Rev. 15-22 ..... 46
72 Harv. L. Rev. 296-304 ..... 50
13 Op. Atty. Gen. 31 ..... 31
13 Op. Atty. Gen. 470 ..... 31
13 Op. Atty. Gen. 472 ..... 31
14 Op. Atty. Gen. 22 ..... 32
14 Op. Atty. Gen. 249 (Case of the Modoc Indians) ..... 31
16 Op. Atty. Gen. 13 ..... 29
16 Op. Atty. Gen. 48 ..... 29
16 Op. Atty. Gen. 578 ..... 48
Washington *Evening Star*, May 26, 1959, p. B-11 ..... 56

# IN THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1959**

**No. 22**

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NINA KINSELLA, WARDEN,

*Appellant,*

*vs.*

UNITED STATES OF AMERICA
EX REL. ALBERTA SINGLETON

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

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## BRIEF FOR THE APPELLEE

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### Opinions Below

The opinion of the United States District Court releasing Mrs. Dial from custody (R. 63-66) is reported at 164 F. Supp. 707. The opinion of the Court of Military Appeals sustaining military jurisdiction over Mrs. Dial (R. 60-61) is reported at 9 USCMA 541 and 26 CMR 321.[1]

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[1] A complete glossary of all military law abbreviations used in this brief appears in Appendix A, *infra*, pp. 111-112.

## Jurisdiction

The judgment of the District Court (R. 68) was entered on September 8, 1958. Appellant's notice of appeal (R. 69-70) was filed on October 8, 1958. This Court noted probable jurisdiction on February 24, 1959 (R. 71) and permitted appellee to proceed *in forma pauperis* (359 U.S. 903). The jurisdiction of this Court rests on 28 U.S.C. §1252.

## Question Presented

Whether a civilian woman, the dependent wife of an American soldier stationed overseas, may constitutionally be tried by court-martial in time of peace for a non-capital offense.

## Constitutional Provisions and Statutes Involved

The relevant constitutional provisions appear sufficiently at p. 2 of the appellant's brief herein. The statutes particularly involved in this case are set forth in Appendix B, *infra*, pp. 113-115.

## Statement

Mrs. Joanna S. Dial lived with her husband, Specialist 2d Class James W. Dial, a soldier in a tank battalion of the Army, and their three children, in Government quarters in the Fallenberg Housing Area, Baumholder, Germany (R. 48).

Their second child, James W. Dial, Jr., about 14 months old (R. 48), presented a temper and feeding problem, particularly after the birth of their youngest child in March 1957 (R. 26-27, 48).

In consequence of a series of beatings administered over a period of several weeks by both its parents, James W.

Dial, Jr., died on May 21, 1957 (R. 48-49), whereupon both were charged with two specifications of unpremeditated murder in violation of Art. 118(2), UCMJ; the first specification alleged murder by beating, the second murder through failure to seek and provide adequate medical care (R. 51-52, 54-55). Both specifications alleged that the offenses were jointly committed (*id.*).

Thereafter, Joanna S. Dial was psychiatrically evaluated (R. 26-28), and though she was found legally responsible and competent to understand the proceedings against her (R. 28), the Army psychiatrist who examined her noted that her I.Q. of 90 "places her on the border line of low average and dull normal intelligence" (R. 27), and concluded with the following diagnostic impression (R. 28):

> "Emotional instability reaction (Immaturity reaction) with marked hostility in a rather primitive restricted and egocentric person of low average intelligence, and of poor social educational background."

Subsequently, both accused offered to plead guilty to the lesser included offense of involuntary manslaughter in violation of Art. 119(b), UCMJ, if the original charges were withdrawn (R. 53, 56). That offer in the case of Joanna Dial specifically stated (R. 53):

> "This offer is not to be construed as consent on my part to the exercise of jurisdiction over me by the military court."

Both offers were accepted by the convening authority, *viz.*, the Commanding General, 2d Armored Division (R. 52, 56).

Meanwhile, on June 29, 1957, new charges alleging involuntary manslaughter in violation of Art. 119, UCMJ, had been preferred, each containing a single specification (R. 34-37).

Both accused were tried together on July 29, 1957 (R. 29-46) on those new charges.[2]

Specialist Dial pleaded guilty (R. 38). Counsel for Mrs. Dial moved for dismissal of the charges against her "on the ground that the court-martial has no jurisdiction over the person of a civilian for trial on charges of this nature" (R. 38), but tendered no argument (R. 38-39), whereupon the motion was denied (R. 39). Mrs. Dial then likewise pleaded guilty (R. 39).

An out-of-court hearing followed before the law officer, who satisfied himself that both pleas of guilty had been understandingly entered (R. 39; App. Ex. 3, R. 57-59). The law officer then, in open court, accepted the plea of guilty of each accused (R. 39), and both the prosecution and the two accused rested (R. 39-40). The court thereupon found both accused guilty of the specification and charge as to each (R. 41).

In the proceedings to determine the sentence to be imposed, the prosecution offered a stipulation, signed by both accused, that set out in detail the manner in which James W. Dial, Jr., had met his death (R. 42-43, 48-50).

Neither accused chose to present any matter in mitigation or extenuation (R. 43-44), whereupon the court, after ten minutes' deliberation, sentenced Specialist Dial to a dishonorable discharge, total forfeitures, and three years' confinement at hard labor, and Mrs. Dial to three years of confinement at hard labor without more (R. 45). This was, in each instance, the maximum permissible sentence for the offense (R. 44; MCM, U.S., 1951, p. 223).

On September 9, 1957, the convening authority approved both sentences (R. 47). Mrs. Dial was ordered confined

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[2] The Statement of the case in the Government's brief, pp. 3-5, fails to disclose that, prior to their trial for manslaughter, both Mrs. Dial and her soldier husband had been charged with murder.

in the Federal Reformatory for Women at Alderson, W. Va. (R. 47), Specialist Dial in the United States Army Branch Disciplinary Barracks, New Cumberland, Pa. (R. 47). For the General Court-Martial Orders in the two cases, see R. 10-14.

Thereafter, on February 14, 1958, an Army Board of Review, acting pursuant to Art. 66, UCMJ, affirmed both convictions (R. 16-22). The Board rejected the contention of appellate counsel for Mrs. Dial that the court-martial did not have jurisdiction over her (R. 17), on the ground (R. 22) that:

> "the necessity for military jurisdiction over dependents charged with non-capital offenses is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments."

On March 17, 1958, The Judge Advocate General of the Army certified the jurisdictional issue to the Court of Military Appeals under Art. 67(b)(2), UCMJ (R. 23-24).

Subsequently, on August 12, 1958, Alberta Singleton, mother of Joanna S. Dial, filed a petition for habeas corpus on her daughter's behalf in the federal court for Southern West Virginia, on the ground that the latter's trial by court-martial had involved a violation of the Constitution (R. 2-4). The writ issued on the same day (R. 1, 62), returnable September 5, 1958, and the appellant warden then made a return, asserting the validity of Mrs. Dial's trial by court-martial, and alleging that, in view of the pendency of her case before the Court of Military Appeals, she had "not exhausted her remedies within the military appellate structure" (R. 5-25).[3]

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[3] The return showed that the execution of Specialist Dial's dishonorable discharge had been suspended, and that he had been transferred to the Disciplinary Barracks at Lompoc, California (R. 6, 15).

Following issuance of the writ of habeas corpus, but before hearing thereon, the Court of Military Appeals sustained the military jurisdiction (R. 60-61; 9 USCMA 541, 26 CMR 321). It said (R. 61):

> "All that remains is to determine whether dependents of military personnel in foreign lands, who are associated with the military in every way but for the performance of military duties, can constitutionally be considered by Congress as part of the armed forces for the purpose of regulating their conduct on the same basis as those in uniform. In our opinion, Congress has that power."

Eleven days later, the United States District Court, Moore, *J.*, held the precise contrary, and ordered Mrs. Dial discharged from custody (R. 63-68). Judge Moore followed an earlier decision of his involving the trial of a dependent by court-martial for a non-capital offense, *U. S. ex rel. Louise Smith* v. *Kinsella,* U.S.D.C., S.D.W.Va., H.C. No. 1963 (R. 63, 64, 67), essentially because he conceived himself bound by *Reid* v. *Covert,* 354 U.S. 1 (in which his own ruling below, *United States* v. *Kinsella,* 137 F. Supp. 806, had been reversed). Judge Moore said (R. 65-66):

> "Moreover, I can think of no logical distinction, insofar as the constitutional power of Congress is concerned, between its asserted power, denied by the Supreme Court, to subject dependents of members of the armed forces overseas to the jurisdiction of courts-martial for capital offenses, and the like questioned power in cases of non-capital offenses. Of course, where matters of life or death are involved, the facts must be scrutinized closely and the decision carefully weighed; but when arrived at, the applicable principle applies alike in all similar cases."

The warden appealed (R. 69-70). This Court noted probable jurisdiction (R. 71) and allowed Mrs. Singleton to proceed *in forma pauperis* on her daughter's behalf (359 U.S. 903).

## Summary of Argument

I. If, as the District of Columbia Circuit held in *Guagliardo* (No. 21), Art. 2(11), UCMJ, is not separable, then there is no need to go farther. But no such easy solution of this or of the related cases is possible.

A. Although the four cases now here involve different separability clauses, every point they present but one is literally separable. Art. 2(11) deals with civilians in three categories; each class can be separately dealt with, and should be so dealt with in view of the separability provision. The distinction between capital and non-capital offenses involves different applications, hence this case and No. 21 can and should be considered as separable from *Reid* v. *Covert*.

B. Even the capital vs. non-capital distinction in *Wilson* (No. 37) can be separately considered, even though not literally affected by the later and broader separability provision, because Congress by amending Art. 2(11) in 1956 and 1959 has fairly indicated an intention that all of the balance of that paragraph should stand.

C. Under the standard of *Dorchy* v. *Kansas*, 264 U.S. 286, 290, all of the portions of Art. 2(11) not affected by *Reid* v. *Covert*, 354 U.S. 1, can and should stand alone with the result that the basic constitutional issues now presented must be faced.

II. The prerequisite to the exercise of military jurisdiction is that the accused have a military status, and therefore, with a narrow wartime exception inapplicable here, no civilian can constitutionally be tried by court-martial.

A. In view of the Government's professed willingness to accept *Reid* v. *Covert*, 354 U.S. 1, its arguments in this case should be restricted to the narrow issue of capital versus non-capital offenses. The cited holding forecloses a whole collection of subsidiary arguments still advanced by the Government, for there the Court, as a Court, did authoritatively construe Clause 14 by holding that civilian dependents charged with capital offenses fell outside the scope of that provision.

B. The exception to the rule of status is the narrow class of civilians who in time of war are "in the field," i.e., at a time when and at a place where military operations are carried on. Art. 2(10), UCMJ; *Toth* v. *Quarles*, 350 U.S. 11, 15; *Reid* v. *Covert*, 354 U.S. 1, 22-23.

The clause "in the field," which has been in every American military code since 1775, was uniformly interpreted by the Attorney General and by The Judge Advocate General of the Army not to warrant the exercise of military jurisdiction over any civilians in time of peace, or, in time of war, over any civilians not in the theater of actual military operations. There is no basis for the Government's present attempt to excise this vital limitation by omitting to notice any of the many published official rulings in which it was stated and repeated, in all of which military jurisdiction over civilians was narrowly and rigidly confined.

C. Military jurisdiction depends on status and not on the nature of the offense charged, hence Winthrop's state-

ments that no statute could constitutionally subject any civilian to military law in time of peace, and that there was no third class that was part civil and part military.

1. The military is a separate community from that of the civilian, *Orloff* v. *Willoughby*, 345 U.S. 83, 94, and hence entrance therein involves such a complex of new relationships that a new and different status results. *In re Grimley*, 137 U.S. 147; *White* v. *United States*, 270 U.S. 175; *United States* v. *Williams*, 302 U.S. 46; *United States* v. *Standard Oil Co.*, 332 U.S. 301. The separateness of the military status is emphasized by the circumstance that military law has its own system of courts under a power wholly independent of that granted by Art. III. *Dynes* v. *Hoover*, 20 How. 65, 79. And this Court has rejected the notion that a civilian who remains a civilian "crosses the vast gulf between civil and military jurisdiction." *Gibson* v. *United States*, 329 U.S. 338.

2. A differentiation between capital and non-capital offenses is appropriate only in a due process setting, involving the exercise of an admitted power, but entirely inappropriate here, where the question is whether a particular power exists at all.

Examples of the first situation may be found in *Wilson* v. *New*, 243 U.S. 332, in *Home Bldg. & Loan Assn.* v. *Blaisdell*, 290 U.S. 398, and in the cases that involve the exercise of admitted jurisdiction in varying contexts of capital or non-capital. Cf. *Powell* v. *Alabama*, 287 U.S. 45, with *Betts* v. *Brady*, 316 U.S. 455, and *Gibbs* v. *Burke*, 337 U.S. 773. But that approach is unavailing and inappropriate where the very existence of an asserted jurisdiction is in issue. Indeed, the due process approach in the present connection is simply an effort to revive the now rejected fallacy of the 1956 opinions in *Covert-Krueger*, "that under the

Constitution the mere absence of a prohibition against an asserted power, plus the abstract reasonableness of its use, is enough to establish the existence of the power." 354 U.S. at 66.

D. The purported distinction between capital and non-capital offenses as a criterion of military jurisdiction is untenable on numerous grounds.

1. It cannot be found in the Constitution, for in the Fifth Amendment the line is drawn between capital and otherwise infamous crimes on the one hand, and all others, not between capital crimes and those that are non-capital. All of the crimes charged in the four cases now here were infamous in the constitutional sense.

Nor can the differentiation be found in Clause 14; it is simply impossible to define "land and naval Forces" as excluding civilian dependents charged with premeditated and felony murder, but as simultaneously including like civilians charged with unpremeditated murder and manslaughter.

2. The purported distinction is likewise untenable as a matter of history; the earlier American military codes with their severe punishments show that capital offenses were then of the essence of the law military. Those codes only distinguished between capital and non-capital offenses in a very few procedural situations, and moreover did not confer a general criminal jurisdiction such as is now asserted over dependents.

3. The purported distinction is likewise untenable in the light of earlier tests of military jurisdiction, which required a showing that the court-martial had jurisdiction of the person and subject-matter. E.g., *Carter* v. *Roberts*,

177 U.S. 496, 498. The Government's purported test would make military jurisdiction over the person depend on the nature of the subject-matter.

4. The distinction is also untenable in the context of the UCMJ. Under §15*a*(3) of the present *Manual for Courts-Martial, Reid* v. *Covert* was a non-capital case when Mrs. Covert's petition for a writ of habeas corpus was filed. Recent military cases involving dependents make it plain that the capital vs. non-capital test is unworkable, particularly in the realm of homicide, and would moreover give to a military officer an unreviewable discretion to exercise military jurisdiction over all dependents merely by downgrading the charges against them.

5. The Government in several cases decided since *Reid* v. *Covert*, 354 U.S. 1, all of which are detailed in the argument, has acted on the assumption that the capital/non-capital jurisdictional distinction is unsound.

E. Historical materials emphasize the lack of foundation for military jurisdiction over civilian dependents in time of peace.

The Government cites only two trials of soldiers' wives by brigade court-martial in the Continental Army at Valley Forge—in time of war and in the field.

No civilian dependent is shown to have been tried by court-martial in time of peace from then until 1950. We found one instance of a non-dependent woman flogged without trial at West Point in 1795, and one instance of a non-dependent woman tried at Detroit in 1797 and drummed out of the garrison there—although there were civil magistrates in the area. Both instances were patently illegal, the latter particularly so because civilians wholly

unconnected with the Army were tried by court-martial at the same time.

From that time and in those circumstances, no woman was ever tried by court-martial until 1950. The facts accordingly utterly disprove the Government's present attempts to show a "solid basis" or a "well-established practice" of trying civilian women by court-martial in time of peace.

The English precedents do not reflect any wider jurisdiction. And, while the first American Articles of War were copied literally from the British, it is not safe to carry British analogies too far. Thus, until early in the XIX Century, the King alone could regulate the Army outside the realm; in the United States the Army was always under Congressional control, and hence in this area any analogy would be misleading.

Moreover, in 1765, the British Parliament refused to extend military jurisdiction over civilians in the North American wilderness, but instead directed the military commanders to take offenders to the nearest civil magistrate for trial. St. 5 Geo. III, c. 33, §XXV. This statute, as well as British texts, undermine the contention that British military jurisdiction was exerted over civilian dependents in areas without civil government. And all the British military trials of women in the Revolutionary period were either in time of war and "in the field" or else in occupied territory.

Not until 1957 did British military jurisdiction diverge from ours; its recent extensions do not represent American law. *Reid* v. *Covert*, 354 U.S. 1; *Toth* v. *Quarles*, 350 U.S. 11; *United States* v. *Cooke*, 336 U.S. 210.

F. On no permissible view of its scope does the Necessary and Proper clause expand Clause 14 so as to include

civilian dependents in time of peace within "land and naval Forces."

1. Even if Clause 14 is to be considered as incorporating Clause 18, the combination of both is still amended and limited by the guarantee of jury trial in the Bill of Rights. Any expansion of Clause 14 would impermissibly contract the scope of jury trial as it stood in 1789, when no American civilian dependent had ever been tried by court-martial except in time of war and in the field. And in no case has this Court ever held that Clause 18 could infringe on a single personal guarantee of the Bill of Rights.

2. In view of the widespread hostility to standing armies at the time of the adoption and ratification of the Constitution, it is plain that the Founders did not intend to confer upon the new government any power to court-martial civilian dependents in time of peace. It is to be noted in this connection that there is no historical support for the notion that what was then feared in substantial quarters was merely a standing army under executive control. The fear extended to a Congressionally controlled standing army as well. If anyone had contemplated the "expansible" concept of Clause 14 now urged by the Government, it is simply impossible that that point would have been passed over in silence by all of the articulate and imaginative anti-Federalists, as in fact it was.

It is significant that, in July 1787, Congress refused to act on a proposal to extend military jurisdiction over civilians in the Northwest Territory until such time as the civil government established by the Northwest Ordinance could begin to function.

3. "We do not write upon a clean slate." *Green* v. *United States*, 356 U.S. 165, 187; *Lee* v. *Madigan*, 358 U.S.

228, 232; *Abbate* v. *United States*, 359 U.S. 187, 190. Consequently the circumstances that, for over a century and a half after 1789, no American lawyer, military or civilian, ever invoked the Necessary and Proper Clause to support military jurisdiction over civilian dependents in time of peace, and that such an argument was first made in 1957, are well-nigh conclusive against such a basis for that jurisdiction now.

To deprive of the right to jury trial a class of civilians who had that right in 1789 is not a legitimate end, is not within the scope of the Constitution, is twice prohibited by the Constitution, and is wholly inconsistent with the spirit of the Constitution. Cf. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 421. Such, indeed, was the holding of *Toth* v. *Quarles*, 350 U.S. 11, 21-23.

III. The Government's arguments as to the alleged necessity of trying civilian dependents by court-martial and the alleged lack of acceptable alternatives are incomplete to the point of being misleading. We shall not embark on any point-by-point refutation of those contentions, but limit our reply to the obvious omissions therein.

A. The Government omits to advise the Court that, under Art. VII of the NATO agreement (and of a like arrangement with Japan), primary jurisdiction over American civilian dependents has been conceded to the foreign nations where such dependents are stationed. Thus by solemn treaty the United States has already provided for the very alternative to court-martial jurisdiction over dependents that it represents to this Court as being unacceptable.

B. The Government omits to advise the Court that at least one American civilian dependent has been turned over to the German courts for trial. That was Mrs.

Cheaves, who brought habeas corpus in the District of Columbia. There may have been many other such cases not reflected in judicial records available to the public.

C. The Government omits to explain why, after successfully persuading this Court to permit it to turn over a soldier to the Japanese authorities for trial in a Japanese Court (*Wilson* v. *Girard*, 354 U.S. 524), the possibility of similar trials in foreign courts for civilian dependents becomes an "unacceptable alternative."

D. The Government fails to explain why practical necessities require it to try by court-martial civilian dependents charged with manslaughter and why there are no acceptable alternatives for military trials of such cases, while at the same time it has been able, without demonstrable inconvenience, to withhold from trying in a military court civilian dependents charged with premeditated murder. No doubt the Government's failure to make such a demonstration lies in the impossibility of formulating it.

E. News items in reputable publications strongly suggest that the American contingents in Spain stand on a footing markedly different from that obtaining in the NATO countries, and that under the terms of an agreement with Germany recently signed but not yet ratified our servicemen and their dependents there have been made far more fully subject to German law than at any time since V-E Day in 1945. We urge the Court to call on the Government to produce those agreements under appropriate safeguards so that they may be checked against the assertions of necessity and alternatives now made.

F. The claim to exercise military jurisdiction over civilian dependents is simply a naked assertion of power: as the Board of Review said in this case, "the necessity

for military jurisdiction over dependents charged with non-capital offenses is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments." We commend the Board members for their candor, but urge that the Court discountenance their rewriting the Constitution by the sword.

## ARGUMENT

### I. Fairly Construed, Article 2(11) of the Uniform Code of Military Justice Is Separable, So That the Constitutional Issue in This Case Must Be Decided.

In the *Guagliardo* case, No. 21, this Term, the Court of Appeals for the District of Columbia held that Art. 2(11), UCMJ, was not separable, so that its application to a civilian employee charged with a non-capital crime "cannot be validly carved out of the invalid general spread of that provision" (R. 41, No. 21). Judge Burger dissented on that issue (R. 42-47, No. 21).

If the District of Columbia Circuit is right in regarding Art. 2(11) as inseparable, then, plainly enough, the judgment below in the present case, which freed a civilian dependent who was convicted of a non-capital offense after trial by court-martial, must be affirmed; for, very clearly, Art. 2(11) purports to make certain specified classes of civilians subject to this system of military law enacted by the Code, and does not make any differentiation whatever of offenses, either by their inherent nature or by the punishment that conviction entails. In short, if Art. 2(11) is inseparable, there is no need to go further.

In our view, however, none of the four cases now before the Court is susceptible of such an easy solution, for a number of reasons. And, while we agree with the Government's conclusion on the issue of separability, we believe

that the analysis which follows arrives at the same result more accurately, with more reliance on the exact statutory language involved, and with less of emotional argument.

A. *Although the cases now before the Court involve two different separability clauses, the points they present are, with one exception, plainly separable even on a literal reading of those clauses.*

The Uniform Code of Military Justice was enacted by Congress as Section 1 of the Act of May 5, 1950, c. 169, 64 Stat. 107.

Section 2 of that Act (64 Stat. 145) provided:

> "Sec. 2. If any article or part thereof, as set out in section 1 of this Act, shall be held invalid, the remainder shall not be affected thereby."

This Section was not codified in the 1952 edition of the U.S. Code; it appears there in a note under Art. 1, UCMJ, then 50 U.S.C. §551, at p. 7389 of the official edition, and at p. 247 of 50 USCA (1951 printing).

The Uniform Code, thus enacted, remained in force through the end of 1956, as its reenactment, with minor and purely verbal revisions, in Chapter 47 of revised Title 10, U.S.C., did not take effect until January 1, 1957. Sec. 51 of the Act of August 10, 1956, c. 1041, 70A Stat. 1, 640; and see footnote at p. 680 of 70A Stat.

The codification of Titles 10 and 32 thus effected contained a separability clause that was more detailed. Sec. 49(d) of the Act of August 10, 1956, *supra*, is as follows:

> "(d) If a part of this Act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this Act is invalid in one or more of its applications, the part remains in effect in all

valid applications that are severable from the invalid applications."

It will have been observed that the second sentence of the foregoing provision—partial invalidity as to particular applications of the statute—is not included in Sec. 2 of the 1950 Act, either in language or in substance.

The Government's argument (Pet. Br., No. 21, pp. 18-26) reflects no awareness of the existence of two different separability provisions, each of differing scope.

This difference involves something more than an academic exercise in draftsmanship, since it happens that, of the quartet of courts-martial-of-civilians cases now before the Court, two are literally governed by the earlier provision, and two by the later one.

(i) In No. 21, *Guagliardo,* the offense was committed on June 20, 1957, and the relator was tried on August 28-29 and September 3-4, 1957 (R. 5, 8, 15). The 1956 separability provision therefore applies.

(ii) In the present case, No. 22, the offense was committed on May 21, 1957, and Mrs. Dial was tried on July 29, 1957 (R. 10-11, 29-45). The 1956 separability provision likewise applies.

(iii) In No. 37, *Wilson,* the offenses were committed from December 1955 to June 1956, and the relator was tried on August 21, 1956 (R. 6-8, 16-40). The 1950 separability provision accordingly was applicable.

(iv) In No. 58, *Grisham,* the offense was committed on December 6, 1952, and the relator was tried on March 20-27, 1953 (R. 9, 16). The 1950 separability clause applies to that case also.

That is to say, in *Guagliardo* and in the present case, the applicable separability provision states that all valid

parts and all valid applications of the law remain in effect, while in *Wilson* and *Gresham* the separability provision states only that all valid parts remain in effect.

Nonetheless, even when the different separability clauses are separately applied, some at least of the differences between *Reid* v. *Covert*, 354 U.S. 1, and the foregoing four cases are capable of separation.

*First.* Art. 2(11) speaks of persons "[1] serving with, [2] employed by, or [3] accompanying the armed forces."

Each of these clauses deals with a separate category.

Those "serving with" the armed forces are "civilians in the employment and service of the *government*," e.g., by branches of Government other than the Department of Defense and its military departments. Winthrop *134, and instances there cited; Sen. Rep. 130, 64th Cong., 1st sess., pp. 37-38.

Those "employed by" the armed forces are, very plainly, the direct employees of those forces.

Those "accompanying" include the former "retainers to the camp" (AW 63 of 1874; AW 2(d) of 1916 and 1920), i.e., the camp followers and dependents. Winthrop *132-*133; Sen. Rep. 130, 64th Cong., 1st sess., pp. 37-38; House Hearings on UCMJ, pp. 875-877.

These three clauses are plainly separable on their face.

Therefore, even under the 1950 separability provision, it is possible to separate the trials of civilian employees involved in *Guagliardo*, *Wilson*, and *Grisham*, persons "employed by" the armed forces, from the dependent wives considered in *Reid* v. *Covert*.

*Second.* Article 2(11) says nothing about the nature of offenses, and consequently any attempt to distinguish for

present purposes between capital and non-capital offenses involves an "application" of that Article within the sense of the 1956 separability provision.

That distinction can properly be made in *Guagliardo* and in this case, because both are subject to the later separability provision, which separates valid applications from invalid ones. That distinction cannot literally be made in respect of the offenses with which *Wilson* was charged, because his case arose under the 1950 separability provision; and of course the distinction does not arise in *Grisham*, since he was tried for a capital offense.

Consequently, on a literal reading of the applicable severability provisions, every aspect in which each of the four cases now under consideration differs from *Reid* v. *Covert* can be considered separately, except one, and that is the non-capital aspect of *Wilson*.

B. *Read in the light of other legislation, both separability clauses must be given the same broad effect, so that every application of Article 2(11) is separable.*

It does not follow, however, that even the non-capital/capital distinction in *Wilson* is foreclosed, for three reasons.

First, Section 49(a) of the codifying Act of August 10, 1956, 70A Stat. at 640, states that:

> "In sections 1-48 of this Act, it is the legislative purpose to restate, without substantive change, the law replaced by those sections on the effective date of this Act."

Literally, of course, that does not cover the separability provision, Sec. 49(d), but inasmuch as Congress indicated an intention to restate the law without change, as it did

not do in its revisions of Titles 18 and 28, the conclusion must be that it considered it was making no change in the law even though in 1956 it spelled out the principle of separability in greater detail than it had in 1950.

Second, Congress has been amending Article 2(11) from time to time to reduce its coverage, without touching the clauses now in question, from which it follows that it did not regard that Article as totally invalid in every application.

Thus, in August 1956, it amended Art. 2(11) to include Guam as one of the areas in which that Article would not apply. Sec. 23 of the Act of August 1, 1956, c. 852, 70 Stat. 908, 911.

Similarly, in June 1959, it amended Art. 2(11) to exclude from its operation all of Alaska. Sec. 6(b) of the Act of June 25, 1959, P.L. 86-70, 73 Stat. 141, 142.

Inasmuch as the portion of Art. 2(11) that purported to include "that part of Alaska east of longitude 172 degrees west" was, in view of *Rassmussen* v. *United States*, 197 U.S. 516, unconstitutional on its face, and so could quite easily have been ignored, it can only be concluded from these amendments that Congress wished to preserve every portion of Art. 2(11) that it did not specifically repeal, particularly since by June 1959 the separability issue had been squarely raised.

The Government does not cite either of these recent amendments.

Third, the 1956 provision expresses the "mood" (*Universal Camera Corp.* v. *Labor Board*, 340 U.S. 474, 487) of Congress, and that provision was enacted before any of the four cases arose. The petition for habeas corpus in *Guagliardo* was filed on December 2, 1957 (No. 21, R. 1),

that in the present case on August 12, 1958 (No. 22, R. 2), *Wilson* was brought on August 20, 1958 (No. 37, R. 1), and the *Grisham* case was instituted on August 11, 1958 (No. 58, R. 1). Otherwise stated, all four cases were brought after this Court's second opinion in *Reid* v. *Covert*, and after the broad separability provision of Sec. 49(d) of the Act of August 10, 1956, became applicable to the reenacted UCMJ. There is in consequence every reason now to apply the concept of separability to a specific "application" of the Code as well as to a specific "part" thereof.

C. *It follows that the constitutional question in this case must be decided.*

The starting point in any discussion of separability vs. inseparability is the principle that "a provision, inherently unobjectionable, cannot be deemed separable unless it appears both that, standing alone, legal effect can be given to it, and that the legislature intended the provision to stand, in case others included in the act and held bad should fall." *Dorchy* v. *Kansas*, 264 U.S. 286, 290.[1]

Here, legal effect can be given to each clause of Art. 2(11) that lists separate categories of civilians said to be subject thereto; and legal effect can likewise be given to each clause of Art. 2(11) in either its capital or non capital applications. Moreover, here the presence of an explicit separability clause shows that "the legislature intended the provision to stand." That is the very essence and purpose of such a clause. It is true that the cases dealing with separability clauses are not in all respects consistent, see Stern, *Separability and Separability Clauses*

[1] Provision held separable on remand, *State* v. *Howat*, 116 Kan. 412, 227 Pac. 752, affirmed *sub nom. Dorchy* v. *Kansas*, 272 U.S. 306.

*in the Supreme Court*, 51 Harv. L. Rev. 76, and that on occasion a decision that particular provisions were to be deemed separable has divided the Court on the issue of "rewriting" the statute. E.g., *United States* v. *Harriss*, 347 U.S. 612.

But in view of what has been pointed out above, pp. 16-22, it would amount to a rewriting and indeed an excision of the separability provision to hold that the several clause of Art. 2(11), UCMJ, were not separable, or that the holding as to capital offenses in *Reid* v. *Covert* was to be broadened to include all offenses through the device of a decision that the Article was inseparable.

This conclusion does not in any sense brush to one side "The wisdom of refraining from avoidable constitutional pronouncements * * *" (*United States* v. *Automobile Workers*, 352 U.S. 567, 590). Rather, it emphasizes the circumstance that a constitutional pronouncement in this case is unavoidable in view of the terms of the statute involved.

A decision rested on the narrow ground of inseparability, however much it would avoid the constitutional issue, is in our view simply not open on a fair reading of the applicable separability provisions. This Court has said that "the very highest of judicial duties is to give effect to the legislative will" (*Wilson* v. *New*, 243 U.S. 332, 359). Discharge of that duty necessarily requires consideration and decision of the basic constitutional issue now presented.

## II. The Prerequisite to the Exercise of Military Jurisdiction Is That the Accused Have a Military Status, and Consequently (With a Narrow Wartime Exception Not Here Applicable), No Civilian Can Constitutionally Be Tried by Court-Martial Regardless of the Nature or Quantum of the Offense With Which He (or She) Is Charged.

### A. *The holding of the Court in* Reid v. Covert *forecloses a whole collection of subsidiary contentions still advanced by the Government.*

In its Jurisdictional Statement in this case (Jur. St. 5), the Government said:

> "We are not asking the Court to reconsider its recent decision in *Covert;* what we ask is that the *Covert* ruling be not extended beyond capital offenses."

In its Brief in this case (p. 9), the Government says:

> "We do not contend that this Court should reexamine and overturn its decision in *Covert*. It is rather our position that *Covert* must be limited by the cardinal fact that the offense there involved was capital."

But those disclaimers were not reflected in the balance of the Government's Jurisdictional Statement in this case, nor do they fairly appear in the briefs on the merits filed herein and in the other related cases, particularly in the brief for the Petitioners in *Guagliardo*, No. 21, where The Pentagon's claim to exercise military jurisdiction over all accompanying civilians is stubbornly reargued at length.

If, in fact, the Government is prepared to accept the holding in *Reid* v. *Covert*, fully and ungrudgingly, then its arguments in this case must be restricted to the narrow issue of capital versus non-capital offenses; its arguments in *Grisham* to the difference between civilian dependents

and civilian employees; and those in *Guagliardo* and *Wilson* to the combination of both differences.

Contentions thus narrowed may properly be applied to the subsidiary reasoning leading up to the ultimate conclusion urged by the Government. But to the extent that the subsidiary reasons are advanced at large, as for instance the Government's renewed insistence that "Court-martial jurisdiction over civilian employees and dependents accompanying or serving with the armed forces overseas is a practical necessity" (Pet. Br., No. 21, pp. 71-82), without any indication that overseas commanders have already been denied such control in respect of dependents' capital offenses and without any assigned reason why they must have in respect of manslaughter or unpremeditated murder a power that they admittedly do not have in respect of premeditated or felony murder, the Government is, notwithstanding its disclaimer, simply engaging in still another reargument of *Reid* v. *Covert*. As we show at various points in the discussion that follows, the Government's present contentions entirely belie its basic disclaimer.

We must decline the Government's invitation to such a return engagement. Accordingly, in the interest of narrowing the issues, we commence by enumerating the propositions decided by *Reid v. Covert*, propositions which now serve as datum points for the four cases presently under consideration.

In our view, a majority of the Court in *Reid* v. *Covert*, 354 U.S. 1, agreed on the following points, which are accordingly foreclosed at this time.

1. Civilian dependents cannot constitutionally be tried by court-martial in time of peace for capital offenses.

2. The power to try civilians by court-martial must be found in some power granted by the Constitution.

3. The protections of the Bill of Rights do not automatically evaporate at the three-mile limit.

4. The "practical considerations" invoked by the Government were found insufficient to justify military trials of dependents for capital offenses.

5. The treaty power, even when phrased as "the power to conduct foreign relations," is wholly irrelevant to the present inquiry.

6. The excepting clause in the Fifth Amendment that refers to "cases arising in the land or naval forces," is not a source or grant of military jurisdiction.

Nonetheless, the Government still seeks to reargue many of the foregoing propositions, as follows:

1. It is still argued, at great length and with considerable fervor, that "Court-martial jurisdiction over civilian employees and dependents accompanying or serving with the armed forces overseas is a practical necessity" (Pet. Br., No. 21, pp. 71-82).

Except for a few pages in its brief in this case (U.S. Br. 8-15), to the effect that "The balance of interests favors court-martial jurisdiction over dependents in non-capital cases," that argument simply repeats the contentions already rejected in *Reid* v. *Covert*.

2. It is argued (Pet. Br., No. 21, pp. 83-101) that "There are no acceptable alternatives to the exercise of court-martial jurisdiction."

As we point out below, pp. 103-109, in greater detail, this argument is thoroughly misleading: It omits to state, what is the fact, that under the NATO and NATO-type agreements, foreign countries where our forces are stationed

have been conceded primary jurisdiction over dependents; it omits to state that, in fact, the Government has turned over at least one civilian dependent to the German courts for trial; and it wholly omits to mention that in *Wilson* v. *Girard*, 354 U.S. 524, the Government was at some pains to turn an American soldier over to the Japanese for trial.

It will hardly occasion surprise that the Government does not seek to explain the glaring inconsistency between its impassioned contentions in 1957 that Girard, a soldier, must be turned over to a foreign government for trial, and its equally impassioned contentions in 1959 that a similar rendition of Guagliardo, Mrs. Dial, Wilson, and Grisham, all of whom are civilians, cannot be regarded as an acceptable alternative.

3. It is argued (Pet. Br., No. 21, pp. 101-108) that "The procedures provided by court-martial are fair." We must admit ourselves unable to appreciate the relevance of that proposition in any of the present controversies over jurisdiction. It might as well be argued that the asserted fairness of court-martial procedure justifies subjection of the wives at Fort Myer, or of the children at the Naval Gun Factory, or of the civilian employees at Quantico, to the Uniform Code of Military Justice.

4. The Government attempts to justify the repetition of its already rejected arguments by saying (Pet. Br., No. 21, p. 28) that, "since the Court in *Covert* did not authoritatively (as a Court) construe Clause 14, we shall necessarily retrace many of our arguments in that case."

But this approach ignores the circumstance that the Court, as a Court, *did* authoritatively construe Clause 14, by holding that civilian dependents charged with capital offenses could not be included within the scope of that provision.

B. *The inapplicable exception here is the unquestioned power to subject to trial by court-martial civilians who in time of war are with the armed forces "in the field," that is, at a time when and at a place where military operations are carried on.*

In *Toth* v. *Quarles*, 350 U.S. 11, 15, the Court said that "the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."

In *Reid* v. *Covert*, 354 U.S. 1, 22-23, four members of the Court said, "We recognize that there might be circumstances where a person could be 'in' the armed services for purposes of Clause 14 even though he had not formally been inducted into the military or did not wear a uniform."

We submit that the only circumstances in which persons who are not actually members of the armed forces can be subjected to military law occur in that very narrow and limited situation where civilians accompany or serve with the forces in the field—which is to say, in a time and at a place where actual military operations are in progress.

That very narrow and limited exception appears in Article 2(10), UCMJ, now 10 U.S.C. §802(10), which renders subject to the Uniform Code—

> "In time of war, persons serving with or accompanying an armed force in the field." [2]

A similar provision—with the same limitation to situations "in the field"—has been in American military law since 1775. AW XXXII of 1775; Sec. XIII, Art. 23, of 1776;

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[2] As originally enacted in 1950, the word "all" preceded "persons," but this was dropped as surplusage in the 1956 revision. H.R. Rep. 970, 84th Cong., 1st sess., p. 55; Sen. Rep. 2484, 84th Cong., 2d sess., p. 66.

AW 60 of 1806; AW 63 of 1874; AW 2(d) of 1916 through 1948; all *infra*, pp. 113-114.

These provisions were uniformly interpreted by the Attorney General and by The Judge Advocate General of the Army to be limited to the actual theater of hostilities in a time of actual hostilities, i.e., the area of a shooting war against a public enemy, and thus to be inapplicable in time of war to any location not in the field, and similarly inapplicable anywhere in time of peace:

16 Op. Atty. Gen. 13;
16 Op. Atty. Gen. 48;
Dig. Op. JAG (1912), pp. 151-152, ¶¶LXIIIA-LXIIID;
*Id.* (1901), pp. 56-58, ¶¶161-168;
*Id.* (1895), pp. 75-77, ¶¶1-8;
*Id.* (1880), pp. 48-49, ¶¶1-8.

The Government makes a determined assault on the "in the field" limitation (Pet. Br., No. 21, pp. 57-61), dealing with it as though it were somehow a personal quirk of the late Colonel Winthrop. The Government conveniently ignores the circumstance that this distinguished military lawyer was simply reflecting—with precision and accuracy—the views of successive Judge Advocates General of the Army, as well as the views set forth in the Opinions of the Attorney General.

It is simply not possible thus to excise a limitation so vigorously insisted on in so many contexts over so many years, and to dismiss it as mere verbal surplusage whenever it appears inconvenient.

We show below, pp. 58-68, that between 1778 and 1950, no civilian dependent, and only one civilian woman, was ever tried by an American court-martial. In the brief for

*Wilson*, petitioner in No. 37, there are discussed in detail the scattered and inconclusive instances, many of them palpably illegal on their face, of civilians tried by court-martial other than "in the field," prior to the date of the first published opinions of The Judge Advocate General of the Army.

What seems to us significant at this juncture is the Government's approach to a whole series of consistent rulings by The Judge Advocate General of the Army. In the past, the Government has urged upon this Court the proposition that such rulings are entitled to particular weight. E.g., Pet. Br. in *Humphrey* v. *Smith*, 336 U.S. 695 (No. 457, Oct. T. 1948), p. 70. On a number of occasions, the Court has given expression to that view. *United States* v. *Cooke*, 336 U.S. 210, 216; *Hiatt* v. *Brown*, 339 U.S. 103, 109; cf. *Bowen* v. *Johnston*, 306 U.S. 19, 30.

It cannot be that the Government is unaware of the rulings now in question, which were duly cited in one of the *Covert* opinions, 354 U.S. at 34, note 61. Perhaps the Government's position as to the weight to be accorded opinions of The Judge Advocate General has now been modified, to the effect that such opinions are better ignored when following them would result in its losing a case.

It is also significant at this juncture that virtually all of the lower court opinions that have relied on the Articles of War cited *supra*, pp. 28-29, as authority for military jurisdiction over civilians in time of peace have completely ignored both the existence and the consistent interpretation of the limiting clause "in the field."[3]

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[3] See, e.g., Judge Holtzoff in *Guagliardo* in the District Court (No. 21, R. 28-31); Judge Burger, dissenting in *Guagliardo* in the Court of Appeals (No. 21, R. 47-50); Judge Arraj in *Wilson* below (No. 37, R. 63-69); *In re Yokoyama*, 170 F. Supp. 467, 470, 474-475 (S.D. Calif.); *In re Varney's Petition*, 141 F. Supp. 190, 201-203 (S.D. Calif.).

This limitation of military jurisdiction over civilians to a time of war and in an area where military operations were in progress was always enforced within rigorously contracted limits.

Thus, in the case of the many undeclared Indian wars of the last half of the XIX Century, it was held by The Judge Advocate General of the Army that court-martial jurisdiction could not be extended "to civilians employed in such connection during the period of an Indian war, but not on the theater of such war." Dig. Op. JAG, 1912, p. 151, ¶LXIIIB; *id.*, 1901, p. 57, ¶165; *id.*, 1895, p. 76, ¶5; *id.*, 1880, p. 49, ¶5. And it was likewise ruled, in 1877 and again in 1903 and 1909, that "In view of the limited theater of Indian wars, this exceptional jurisdiction is to be extended to civilians, on account of offenses committed during such wars, with even greater caution than in a general war." *Ibid.* Recent lower court opinions that rely on the supposed analogy between the Indian wars and today's cold war (see Burger, *J.*, dissenting in *Guagliardo* (No. 21, R. 45); *United States* v. *Burney*, 6 USCMA 776, 799) therefore overlook the essential basis of the cited military rulings. And, it should be added, the analogy is quite inaccurate in any event, because the Indian wars involved fighting and casualties and thus were real wars in fact (13 Op. Atty. Gen. 31; *id.* 470; *id.* 472), in which the Indians were accorded belligerent rights (*United States* v. *Plenty Horses*, U.S.D.C., D. So. Dak., Winthrop *1212) and were held to belligerent obligations (*Case of the Modoc Indians*, 14 Op. Atty. Gen. 249).

Significantly enough, this limited wartime military jurisdiction over civilians was held not to survive the end of a war, whether general or involving only Indians. "The jurisdiction, to be lawfully exercised, must be exercised during the *status belli*." Dig. Op. JAG, 1912, p. 151, ¶LXIIIB1;

*id.*, 1901, p. 57, ¶166; *id.*, 1895, p. 76, ¶6; *id.*, 1880, p. 49, ¶6; Winthrop, *138. In this respect the jurisdiction to try civilians by court-martial resembled the jurisdiction to try a spy under the laws of war, which disappears once the war ends. *Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228.

Since no contention is or could be made that the offense charged against Mrs. Dial—or, for that matter, those charged against *Guagliardo*, *Wilson*, or *Grisham*—took place "in the field" in the sense of Art. 2(10), UCMJ, or of its statutory predecessors, there is no need to delimit the geographical boundaries of "the field" in any of the pending cases. See, on that subject, the opinion of Attorney General Devens (who had been a Major General of Volunteers in the Civil War)[4] in 14 Op. Atty. Gen. 22; *In re Berue*, 54 F. Supp. 252 (S.D. Ohio); and the committee reports on Art. 2(10), UCMJ (H.R. Rep. 491, p. 11; S. Rep. 486, p. 7; both 81st Cong., 1st sess.) Nor is there any need to consider the correctness or otherwise of the World War I rulings that held the entire area of the United States to be "in the field." 2 Op. JAG (1918) 243-245; 4 Bull. JAG 223-229; *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.); *Hines* v. *Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U.S. 645.

In *Kinsella* v. *Krueger*, the companion case to *Reid* v. *Covert*, where the offense for which Mrs. Smith was tried by court-martial was committed in Japan in October 1952 (R. 1-2, 7; No. 713, Oct. T. 1955), the Government invoked Art. 2(10) in its return and answer (R. 7, ¶¶3, 6), but the point was not litigated at the habeas corpus hearing, nor seriously raised thereafter.

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[4] "He had seen the elephant pretty thoroughly in his time. He commanded a division during the war and was Attorney General of the United States under President Hayes." 1 *Holmes-Pollock Letters* (Howe ed. 1941) 34. Cf. 1 *Holmes-Laski Letters* (Howe ed. 1953) 304.

A number of the decisions now relied upon by the Government to sustain the peacetime military jurisdiction in the four pending cases (Pet. Br., No. 21, pp. 61-65) were wartime cases arising "in the field," or at least in what was held to be "in the field"; e.g., *Hines* v. *Mikell*, *Ex parte Jochen*, and *In re Berue*, all *supra*; *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.); *Ex parte Falls*, 251 Fed. 415 (D.N.J.); *In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y.); *McCune* v. *Kilpatrick*, 53 F. Supp. 80 (E.D. Va.); *Perlstein* v. *United States*, 151 F. 2d 167 (C.A. 3), certiorari granted, 327 U.S. 777, and dismissed because moot, 328 U.S. 822.

All of those cases, together with some others, arose in World Wars I and II; all involved civilian employees, none involved a civilian dependent. Consequently they are discussed in the brief of the petitioner *Wilson* in No. 37, where it is pointed out that a number of them cannot properly be sustained even under Art. 2(10) and its statutory predecessors.

It is sufficient now to repeat that the Art. 2(10) jurisdiction over civilians who in time of war, declared or otherwise, are actually in the field, i.e., where military operations are being conducted, represents the only instance when civilians can properly be tried by court-martial.

Whether this acknowledged and unquestioned jurisdiction, to which in our view the comments quoted above, p. 28, refer, is properly rested on the war power or on the Clause 14 power, seems to us quite immaterial. It is enough for present purposes that this jurisdiction, whatever its source, is plainly insufficient to reach the four cases now before the Court.

We agree with the Government (Pet. Br., No. 21, p. 57) that "the Congressional power under Clause 14 is 'peace power' as much as 'war power.'" But the peace power of Clause 14 extends only to those who have a military status.

C. *Military jurisdiction depends on military status and not on the nature of the offense charged.*

The Government's position in the present case, succinctly stated, is that it does not question the holding of *Reid* v. *Covert* that civilian dependents cannot be tried by court-martial for capital offenses, but that they can be so tried for non-capital offenses.

That argument, we submit, is unsound in law, in logic, and in history. In our view, the prerequisite to the exercise of military jurisdiction—once past the narrow exception just discussed under the preceding subheading—is a military status on the part of the person accused, and such jurisdiction does not in any sense depend on the nature or quantum of the offense with which that person is charged.

Colonel Winthrop declared, after a lifetime spent in the study and practice of military law, that (p. 146; italics in original),

> "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"

Winthrop also declared (p. 145) that the Constitution

> "in a further provision also,—the Vth Amendment,—clearly distinguishes the military from the civil class as separate communities. It recognizes no third class which is part civil and part military—military for a particular purpose or in a particular situation, and civil for all other purposes and in all other situations—and it cannot be perceived how Congress can create such a class, without a disregard of the letter and spirit of the organic law."

We shall now proceed to a documentation of these conclusions.

1. *Military jurisdiction depends upon military status.*

We start with the proposition, succinctly expressed in a recent opinion, that "The military constitutes a specialized community governed by a separate discipline from that of the civilian." *Orloff* v. *Willoughby*, 345 U.S. 83, 94.

The military is a separate community because, when individuals become members of the armed forces, they assume new relationships and new obligations, which are so comprehensive in their totality as to constitute a status. See, e.g., *In re Grimley*, 137 U.S. 147; *White* v. *United States*, 270 U.S. 175; *United States* v. *Williams*, 302 U.S. 46; *United States* v. *Standard Oil Co.*, 332 U.S. 301. But the Government's arguments completely overlook the circumstance that assumption of this status necessarily involves the individual's subjection to courts-martial, which "form a system of courts separate from civil courts and created by virtue of an independent grant of power in the Constitution." Brandeis, *J.*, in *Crowell* v. *Benson*, 285 U.S. 22, 90, note 26. And see *Dynes* v. *Hoover*, 20 How. 65, 79, where it was early pointed out that the Clause 14 power "is given without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed that the two powers are entirely independent of each other."

When an individual is commissioned, he assumes military status upon acceptance of a regular commission and upon call to duty under a non regular commission. For those voluntarily serving in the ranks the moment of transition is the signing of the contract of enlistment (*In re Grimley*, 137 U.S. 147), for those conscripted since 1940 it is the induction ceremony (*Billings* v. *Truesdell*, 321 U.S. 542).

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Under the Selective Draft Act of 1917 it was the time the draftee was ordered to report for duty (e.g., *Franks* v. *Murray*,

This circumstance is emphasized in the Court's discussion in *In re Grimley*, 137 U.S. 147, 151, 152:

> "But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes" (p. 151).
>
> "By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged" (p. 152).

The effect of the change in status was further emphasized in *Gibson* v. *United States*, 329 U.S. 338, which involved a conscientious objector who had reported at a camp for work of national importance, and had then, after five days' stay there, departed without leave. The Government accordingly argued (329 U.S. at 352), by analogy to the *Grimley* case, "that when Gibson went to the camp and there went through the preliminary formalities for becoming a member, he became 'inducted' as a camp member, just as one becomes a member of the armed forces by undergoing the induction ceremony, * * *. Thereafter * * * Gibson became subject to the camp's 'jurisdiction,' just as the wrongfully inducted soldier would become subject to military jurisdiction; and, like the latter, cannot raise the illegality of his induction as a defense to a charge of violating any duty imposed upon inducted members * * *."

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248 Fed. 865 (C.A. 8); cf. *Patterson* v. *Lamb*, 329 U.S. 539), and the same was true in the case of the militiamen called into federal service in earlier conflicts (*Houston* v. *Moore*, 5 Wheat. 1; *Martin* v. *Mott*, 12 Wheat. 19).

This Court rejected the argument; it said (329 U.S. at 357):

> "In the first place, there are obvious and important differences between the two situations which it is sought to connect by the claimed resemblance. Not the least is that in the one instance the person concerned crosses the vast gulf between civil and military jurisdiction, with all the attendant consequences for change in status and rights, whereas in the other no such chasm is traversed. The alleged transfer of 'jurisdiction' is only from one civilian agency to another, both branches of the Selective Service System, and there is none at all from the authority of the civilian courts as agencies for the enforcement of obligations imposed by the law. There is in fact no change in 'jurisdiction' whatsoever, except in the sense that from the time he becomes a camp member the registrant's duties are different and his orders come through different channels of the same agency.
>
> "Unlike the man 'actually inducted,' the person classified IV-E remains a civilian; his duties are not military in character; he is not subject to military discipline or authority; and for violation of duties or orders he cannot be tried by court martial or military tribunal. On the contrary, the Selective Service Act expressly provides the same civil penalties and mode of trial for violating duties arising when he enters the camp as for those arising before that time."

Accordingly, it follows that a civilian who becomes a soldier's dependent, whether by marriage in the case of a wife, or by living with the soldier as in the case of a mother-in-law, or by birth in the case of a child, does not by

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[1] See the assumptions in the discussion at pp. 876-877 of the House Hearings on the UCMJ as to the comparative amenability to

assuming the relation of dependency become one who "crosses the vast gulf between civil and military jurisdiction, with all the attendant consequences for change in status and rights."

That status can only be assumed, in the case of officers, by accepting a commission, or, in the case of enlisted persons, by taking a specific oath (10 U.S.C. §501):

> "I, ....., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice."

See also the oath for National Guardsmen prescribed by 32 U.S.C. §304.

Very plainly, no such crossing from civil to military jurisdiction takes place when the dependent lives on a military reservation in the United States, and we think that *Reid* v. *Covert* disposes of the contention that the situation is any different where the American military jurisdiction is sought to be exercised over a civilian dependent beyond the three-mile limit. And, as we shall proceed to demonstrate in more detail below, the military jurisdiction here in question cannot be sustained by being separated into jurisdiction to punish for non-capital crimes now that it has been finally decided that no such jurisdiction exists in respect of capital crimes.

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military law of a mother-in-law temporarily visiting an officer abroad as compared with one living with him there permanently.

2. *A differentiation between capital and non-capital offenses is appropriate only in a due process setting, involving the exercise of an admitted power, but entirely inappropriate here, where the question is whether a particular power exists at all.*

The basic fallacy that inheres in the Government's effort to differentiate between capital and non-capital offenses in this case (Br. 8-15) is the treatment in terms of due process of what is a question of jurisdiction, the treatment in the setting of appropriate exercise of power of what is a question of the existence of power.

Otherwise stated, the Government is endeavoring to expand the scope of Clause 14—and correspondingly to contract the protection of the Sixth Amendment—in terms and concepts that are appropriate only to the construction of the Due Process Clauses of the Fifth and Fourteenth Amendments.

In short, the Government is here resurrecting the fallacy underlying the premise of the first opinions in *Kinsella* v. *Krueger*, 351 U.S. 470, and *Reid* v. *Covert*, 351 U.S. 487, "that under the Constitution the mere absence of a prohibition against an asserted power, plus the abstract reasonableness of its use, is enough to establish the existence of the power." 354 U.S. at 66.

It was the recognition of this fallacy that led to the rehearing in *Krueger* and *Covert* and to the withdrawal, following the rehearing, of the earlier opinions. Yet the Government is now urging reaffirmation of the earlier view, which since 1957 is frankly conceded to have been erroneous.

A brief review of a number of basic and unquestioned precedents will serve to assist in exposing the fundamental misapprehensions of the Government's arguments on the capital versus non-capital distinction.

In *Wilson* v. *New*, 243 U.S. 332, where this Court sustained the validity of an eight-hour law for railway employees that Congress had passed to avert a nationwide rail strike, a matter in that pre-truck and pre-airplane age of far more concern than it might be today, it was said (243 U.S. at 348) that

> "although an emergency may not call into life a power which has never lived, nevertheless emergency may afford a reason for the exercise of a living power already enjoyed."

That thought was clarified and expanded in the case that sustained the Minnesota Mortgage Moratorium law against a contention that it violated the Contract Clause, *Home Building & Loan Assn.* v. *Blaisdell*, 290 U.S. 398. There Chief Justice Hughes, speaking for the Court, said (290 U.S. at 425, 426):

> "Emergency does not create power. Emergency does not increase granted power or remove or diminish the restrictions imposed upon power granted or reserved." * * *
>
> "While emergency does not create power, emergency may furnish the occasion for the exercise of power." * * *
>
> "When the provisions of the Constitution, in grant or restriction, are specific, so particularized as not to admit of construction, no question is presented. Thus, emergency would not permit a State to have more than two Senators in the Congress, or permit the election of President by a general popular vote without regard to the number of electors to which the States are respectively entitled, or permit the States to 'coin money' or to 'make anything but gold and silver coin a tender in payment of debts.' But where constitutional grants and

limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in the details. That is true of the contract clause."

We are dealing here with a somewhat intermediate situation, the content of "land and naval Forces" in Clause 14, in the light of the now unquestioned holding of *Reid* v. *Covert*, that this Clause does not include civilian dependents charged with the commission of capital offenses. Passing for the moment any possible contention that civilian dependents stand on a footing different from that of civilian employees, a matter dealt with in the petitioner *Wilson's* brief in No. 37, the proposition now in question is the argument advanced in the present case by the Government, which is that while the power "To make Rules for the Government and Regulation of the land and naval Forces" does not extend to capital offenses committed by defendants, it does embrace their non-capital offenses.

We confess to an inability to find that distinction either in the words of the Constitution, or in "their origin and the line of their growth." *Gompers* v. *United States*, 233 U.S. 604, 610.

The distinction between capital and non-capital offenses is one appropriate to considerations of Due Process, where the exercise of an admitted power is in question. That issue arises, in varying contexts and with varying results, in criminal cases where a capital penalty has been adjudged. See the following representative examples out of many: *Powell* v. *Alabama*, 287 U.S. 45; *Brown* v. *Mississippi*, 297 U.S. 278; *Chambers* v. *Florida*, 309 U.S. 227; *Lisenba* v. *California*, 314 U.S. 219; *Francis* v. *Resweber*, 329 U.S. 459; *Smith* v. *Baldi*, 344 U.S. 561; *Stein* v. *New York*, 346 U.S. 156; *Reece* v. *Georgia*, 350 U.S. 85; *Darcy* v. *Handy*, 351 U.S. 454; *Chessman* v. *Teets*, 354 U.S. 156.

Specifically, a denial of counsel that will vitiate a conviction in a capital case (*Powell* v. *Alabama*, 287 U.S. 45) may or may not result in reversal in one non-capital (compare *Betts* v. *Brady*, 316 U.S. 455, with *Gibbs* v. *Burke*, 337 U.S. 773). In all those instances, the courts whose judgments were being reviewed had undoubted jurisdiction to try the several defendants, and the question was whether the exercise of that jurisdiction satisfied the standards of the Due Process Clause. Here, however, the very existence of the power of courts-martial to try civilian dependents for any offense is in issue, and that power cannot vary from offense to offense. If the courts-martial have jurisdiction at all, they have jurisdiction to try for all offenses in the Uniform Code that by their terms include civilians. But since courts-martial lack jurisdiction to try dependents for capital offenses, essentially because such dependents cannot fairly be included in Clause 14, we think it necessarily follows that non-capital offenses committed by dependents are similarly excluded from the reach of the military jurisdiction.

That conclusion is not one newly generated on behalf of Mrs. Dial. It has had the support of seven members of the Court—of three Justices on consideration of the petition for rehearing in *Covert* and *Krueger*, see 352 U.S. at 902, and of four more after the rehearing. It likewise had the support of the Government at that time, see pp. 16-20, 82-95, Supplemental Brief for Appellant and Petitioner on Rehearing, Nos. 701 and 713, Oct. T. 1955. And, as will be pointed out below, pp. 55-57, the Government in a number of later cases likewise acquiesced.

None the less, we deem it appropriate to set forth additional supporting reasons why the Government's present arguments in support of the distinction are not well founded.

D. *The purported distinction between capital and non-capital offenses as a criterion of military jurisdiction over civilian dependents is untenable on numerous grounds.*

1. *The purported jurisdictional distinction cannot be found in the Constitution.*

The only reference to capital crimes in the Constitution is in the first portion of the Fifth Amendment:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces * * * ."

This provision on its face undercuts in two respects the Government's purported distinction between capital and non-capital offenses:

First, the Constitutional differentiation by its terms has no application to any trial by court-martial.

Second, the Constitutional differentiation is not between capital and non-capital offenses, but between capital or otherwise infamous crimes and all others.

Any offense for which imprisonment at hard labor may be adjudged is, in a constitutional sense, an infamous crime. *United States* v. *Moreland*, 258 U.S. 433; *Wong Wing* v. *United States*, 163 U.S. 228; *Re Claasen*, 140 U.S. 200; cf. *Duke* v. *United States*, 301 U.S. 492. Even if one does not agree with all that is said in the *Moreland* case, see Oppenheimer, *Infamous Crimes and the Moreland Case*, 36 Harv. L. Rev. 299, it is still perfectly plain that the crime charged against Mrs. Dial was an infamous one by constitutional standards:

She was originally charged with unpremeditated murder in violation of Art. 118(2), UCMJ (R. 51-52). Without

waiving her jurisdictional rights, she offered to plead guilty to involuntary manslaughter in violation of Art. 119, UCMJ (R. 53); her offer was accepted (R. 52); and the charges were redrafted accordingly (R. 36-37). She pleaded guilty (R. 39), and was sentenced to be confined at hard labor for three years (R. 45), the maximum penalty for the offense (MCM, 1951, p. 223). This sentence was approved by the convening authority, who designated the Federal Reformatory for Women at Alderson, W. Va., as the place of confinement (R. 11).

Plainly then, Mrs. Dial was held to answer for an infamous crime.

We note in passing in the margin that the other two instances of non-capital offenses tried by court-martial that are now before this Court were similarly infamous in a constitutional sense.[7]

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[7] *Guagliardo*, No. 21: Charge I (R. 15), stealing in violation of Art. 121, UCMJ; value of goods allegedly stolen, over $4000; maximum permissible sentence, 5 years confinement at hard labor (MCM, 1951, p. 223). Charge II (R. 15), conspiracy to steal goods worth over $4000 in violation of Art. 81, UCMJ; maximum permissible sentence, 5 years confinement at hard labor (MCM, 1951, p. 219, note 4). Found guilty and sentenced to 3 years confinement at hard labor; finding of guilty of Charge I disapproved, but sentence approved (R. 2, 5-6, 8-9). Confined at Branch United States Disciplinary Barracks, New Cumberland, Pa. (R. 19).

*Wilson*, No. 37: Charge I (R. 19), 2 specs., lewd and lascivious acts with minors, in violation of Art. 134, UCMJ; maximum penalty for each act, 7 years confinement at hard labor (MCM, 1951, p. 226; see R. 38). Charge II (R. 19-20), 3 specs., sodomy, in violation of Art. 125, UCMJ; maximum penalty for each act, 5 years confinement at hard labor (MCM, 1951, p. 223; see R. 38). Additional Charge (R. 21-22), 2 specs., exhibiting obscene pictures in violation of Art. 134, UCMJ; maximum penalty for each act, 4 months confinement at hard labor (MCM, 1951, p. 225; see R. 38). Total permissible punishment for all offenses charged, 29 years and 8 months confinement at hard labor (R. 38). Sentence, confinement at hard labor for 10 years (R. 39) cut to 5 years by the convening authority, and Branch United States Disciplinary

Another approach, based on the language of Clause 14, leads to the same result.

The Government urges that "the land and naval Forces" includes all civilians enumerated in Art. 2(11), UCMJ, at any time, at any place, and—on the basis of some of the precedents it adduces—anywhere.

We say, and we have vouched to warranty the Attorney General and The Judge Advocate General of the Army, that the only civilians who can properly be comprehended within that phrase are those who are with the land and naval forces at a time and in a place where military operations are in progress.

In *Reid* v. *Covert*, this Court rejected the Government's contentions, and adopted those we are now advancing, in a case that involved civilian dependents charged with capital offenses.

So far, so good; but, taking that as a datum point, we submit that it is impossible, even with the most refined constitutional exegesis, to conclude that the correct interpretation of "land and naval Forces" plainly excludes dependents charged with premeditated murder but somehow, with equal clarity, includes dependents charged with unpremeditated murder or with manslaughter.

We submit that no such distinction can possibly be found in the terms of Clause 14.

The foregoing conclusion, drawn from the language of two provisions of the Constitution, that the Government's capital-non-capital distinction is utterly untenable, is forti-

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Barracks, New Cumberland, Pa., designated as place of confinement (R. 8). This was later changed to a U. S. penitentiary or reformatory (R. 10-11). Wilson is presently a patient at Fitzsimons Army Hospital (R. 1, 11).

fied when that distinction is examined from other points of view.

2. *The purported jurisdictional distinction is untenable as a matter of history.*[8]

When the Constitutional Convention met, and at all times during the ratifying process, there was no Navy (Knox, *A History of the United States Navy* (1948 ed.) 44), and the minuscule American Army was governed by the Articles of War of 1776 as amended by those of 1786 (Winthrop *1489-*1508).

These were 107 in number, of which only 59 were punitive in any degree; some made provision only for petty fines. No less than seventeen articles enumerated capital offenses, for which the death penalty could be imposed, including desertion, which was capital at all times (Sec. VI, Arts. 1 and 3 of 1776). See analysis in Appendix C, below, pp. 116-118.

Plainly, then, capital offenses were of the essence of the law military when the Constitution was drafted and ratified.

And, despite the observation of Secretary of War Knox, made in August 1789 (1 Am. St. Pap. Mil. Aff. 6), "that the change in the Government of the United States will require that the articles of war be revised and adapted to the constitution," no comprehensive set of Articles of War under the Constitution was enacted until 1806, and then only after considerable legislative delay. See, for a summary of the legislative history, 72 Harv. L. Rev. at 15-22.

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[8] The discussion that follows considers only whether, as a matter of historical evidence, there is any basis for a division of military jurisdiction between capital and non-capital offenses.

Other discussions of historical materials appear below in other connections (pp. 57-81, 87-95), and in the brief filed on behalf of the petitioner *Wilson* in No. 37.

In the interim, the death penalty had frequently been exacted under successive commanders, principally in respect of desertion,[9] and when the 1806 revision was under consideration, one Member of Congress complained bitterly that "almost every article in the bill was stained with blood" (15 Annals of Cong. 326). But his objections did not prevail (*id.*, 327, 338).

The 1806 Articles of War were 101 in number, plus a section denouncing spying. Fifty-six out of those 102 provisions were punitive, and of those 16, including again desertion at all times (AW 20 and AW 22 of 1806), were capital. See Appendix C, *infra*, pp. 118-121. Not until 1830 did Congress reduce desertion in peacetime to the status of a non-capital offense. Act of May 29, 1830, c. 183, 4 Stat. 418.

But while these early American military codes were thus severe, and while, as has been seen, they subjected to their provisions civilians with the army "in the field" (Sec. XIII, Art. 23, of 1776; AW 60 of 1806), each contained only a very few provisions that distinguished between capital and non-capital offenses:

(i) A regimental or garrison court-martial—unlike a general court-martial—could not try capital cases. AW 4 of 1786; AW 67 of 1806.

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[9] Under St. Clair: 2 W. H. Smith, *The St. Clair Papers* (1882) 249, 255; *Winthrop Sargent Diary of the St. Clair Campaign*, 33 Ohio Arch. & Hist. Soc. Proc. (1924) 247-248.

Under Wayne: *Wayne Orderly Book*, 34 Mich. Pioneer & Hist. Coll. 341, and MS., Hist. Soc. Pa., *passim;* see letter Wayne to Sec. Knox, Sept. 7, 1792, in 1 *Campaign into the Wilderness: The Wayne-Knox-Pickering-McHenry Correspondence* (Knopf ed. 1955) 81.

Under Wilkinson: *Wilkinson Order Book* (MS., Nat. Archives) 679, 715-718 (execution for repeated desertion confirmed by Pres. Jefferson).

(ii) Only those offenses could be capitally punished that had been specifically made capital by Congress. Sec. XVIII, Art. 3, of 1776; AW 24 of 1786; AW 87 of 1806.

(iii) Depositions could not be used in capital cases. Res. of Nov. 16, 1779, 15 J. Cont. Cong. 1277, 1278; AW 10 of 1786; AW 74 of 1806.

(iv) Records of courts of inquiry could only be used "in cases not capital or extending to the dismission of an officer." AW 26 of 1786; AW 92 of 1806.

Finally, neither of the first two American military codes in effect under the Constitution specifically denounced common law felonies as such, but contemplated rather that such crimes would be dealt with by the civil authorities, to which end each provided that offenders against the civil law would, under punitive sanctions to compel obedience, be handed over to the civil magistrate. Sec. X, Art. 1, of 1776; AW 33 of 1806. Indeed, it was long held that neither the military nor the naval articles established a general criminal jurisdiction in respect of offenses committed by soldiers and sailors against civilians in circumstances not affecting service discipline. Dig. Op. JAG, 1895, pp. 67-69, ¶¶2, 3; 16 Op. Atty. Gen. 578; G.O. 22 of 1833 (ruling by Maj. Gen. Macomb, then Commanding the Army).[10]

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[10] G.O. 22 of 1833, Sec. II:

"The General in Chief upon a full consideration of this case regrets that he cannot approve of the finding and sentence: Not because the offence committed [stealing from a valise at a public wharf; stealing from a barn or stable] should not be punished in the most exemplary manner, but because the charge as specified, is for a crime, cognizable before a civil tribunal, and not before a Court Martial. Had the specification of the charge been framed in such a manner as to have made it a military offence, of which it is no doubt susceptible, the General would have found it his duty to have confirmed the sentence. * * * All that was requisite in this case to have rendered the offence cognizable by a Military Court, was to have charged private Townsend, with conduct highly

Not until 1863 were common law felonies as such made punishable by court-martial, and then only in time of war. Sec. 30 of the Act of March 3, 1863, c. 75, 12 Stat. 731, 736; AW 58 of 1874. Thereafter, non-capital offenses were dealt with under the general article as "crimes not capital." *Ex parte Mason*, 105 U.S. 696; *Grafton* v. *United States*, 206 U.S. 333. Such offenses only became punishable *eo nomine* after the effective date of AW 93 of 1916, and the capital common law felonies, murder and rape, could not be tried by court-martial when committed in the United States in peacetime until the advent of the Uniform Code. Cf. *Lee* v. *Madigan*, 358 U.S. 228.

The short of the matter, therefore, is that the distinction between capital and non-capital offenses that the Government now puts forward as the touchstone of military jurisdiction over civilian dependents is wholly foreign to anything in the origin of Clause 14 and is equally foreign to anything in the lines of its growth that is delineated in successive enactments of the military code over the years.

3. *The purported jurisdictional distinction is untenable in the light of earlier tests of military jurisdiction.*

There was no opinion of the Court in *Burns* v. *Wilson*, 346 U.S. 137, which accordingly does not stand as a precedent. *Hertz* v. *Woodman*, 218 U.S. 205, 212-214; *United States* v. *Pink*, 315 U.S. 203, 216. Consequently, the extent to which the doctrine of *Johnson* v. *Zerbst*, 304 U.S. 458, may properly be applied on collateral review of a con-

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disorderly and unsoldierlike in being absent from his Quarters on or about the last day of August, 1832, and at that time stealing from a valise at the public wharf at West Point, New York, one black cloth * * * &c., to the prejudice of Military discipline; in which case the circumstances of the theft can only be received as the evidence of the disorderly and unsoldierlike conduct; and then the Prisoner if found guilty would have been subject to the punishment authorized by the 99th article and rules of war [of 1806]."

viction by court-martial still remains an open question. See 346 U.S. at 844-851; 72 Harv. L. Rev. at 296-304.

But the pre-*Johnson* v. *Zerbst* test of the jurisdictional validity of a conviction by court-martial has always been clear; it was several times stated by this Court (*Carter* v. *Roberts*, 177 U.S. 496, 498; *Carter* v. *McClaughry*, 183 U.S. 365, 380-381; *Grafton* v. *United States*, 206 U.S. 333, 347-348):

> "Courts-martial are lawful tribunals, with authority to finally determine any case over which they have jurisdiction, and their proceedings, when confirmed as provided, are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced."

That formulation of the rule explains why the Government's present argument is untenable, *viz.*, because that argument makes military jurisdiction over the person depend on the nature of the subject matter, and because it applies to jurisdiction over civilian dependents a test of subject matter wholly different from that applicable to jurisdiction over persons actually in the service.

Some crimes are wholly outside the jurisdiction of a court-martial; treason is perhaps the clearest example. Winthrop *973; cf. *United States* v. *Provoo*, 215 F. 2d 531 (C.A. 2); *Petition of Provoo*, 17 F.R.D. 183 (D. Md.), affirmed, 350 U.S. 857. Thus, if a soldier duly enlisted were sought to be prosecuted before a court-martial for treason committed within his current enlistment, the court would plainly have jurisdiction over his person, although, equally plainly, it would lack jurisdiction over the subject matter.

In view of Arts. 118 and 119, UCMJ, a court-martial unquestionably has jurisdiction over the subject matter of homicide. Yet on the view urged by the Government, court-martial jurisdiction over a civilian dependent would exist in respect of Art. 118(2), Art. 118(3), and Art. 119, but would be wholly absent in respect of Art. 118(1) and Art. 118(4)—because the first three are non-capital and the latter two capital. See text of Art. 118, *infra* p. 115.

It must therefore be obvious, without further elaboration, that the Government's distinction is shown, in the light of the traditional test of military jurisdiction, to be quite illusory.

4. *The purported jurisdictional distinction is untenable in the context of the Uniform Code of Military Justice.*

The present *Manual for Courts-Martial* defines capital offense as follows in ¶15*a*:

> "(2) An offense is capital within the meaning of Article 19 when the maximum punishment which a general court-martial may adjudge therefor includes the death penalty. Subject to the exceptions noted in the following subparagraph, the offenses denounced in Articles 94 [Mutiny or sedition], 99 [Misbehavior before the enemy], 100 [Subordinate compelling surrender], 102 [Forcing a safeguard], 104 [Aiding the enemy], 110*a* [Willful hazarding of vessel], 118(1) and (4) [Premeditated and felony murder], and 120*a* [Rape] are capital at all times; those denounced by Articles 85 [Desertion], 90 [Assaulting or willfully disobeying officer], 101 [Improper use of countersign], 106 [Spies], and 113 [Misbehavior of sentinel] are capital if committed in time of war.
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> "(3) Although capital under one of the articles cited, an offense is not capital if the applicable maximum

limit of punishment prescribed by the President under Article 56 is less than death * * *[11] or, in any case in which the death penalty is not mandatory but is authorized by law whenever the authority competent to convene a court-martial for a capital case has directed that the case be treated as non-capital pursuant to Article 49.[12] Upon a rehearing or a new trial a case is not capital if the authorized sentence adjudged at a prior hearing or trial was other than death (Art. 63). * * *"

Let us apply the foregoing criteria to the Government's present contentions in a number of recent situations where civilian dependents were tried by court-martial.

(a) A civilian dependent is charged with premeditated murder under Art. 118(1), a capital offense, but in order to enable the prosecution to use depositions, the convening authority under Art. 49(f), *infra* note 12, directs that the case be treated as non-capital. A recent case involved this precise situation. CM 376967, *Eunice M. Brillhart*, review denied, 6 USCMA 808.

(b) A civilian dependent is charged with premeditated murder under Art. 118(1), a capital offense, and the case is similarly treated as non-capital to permit the use of depositions by the prosecution. Thereafter, pursuant to an agreement with the convening authority, the charges are

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[11] Thus, see MCM, p. 223, wilfully hazarding a vessel in violation of Art. 110*a* has been made non-capital under the Table of Maximum Punishments.

[12] Art. 49(f) provides in pertinent part that "a deposition may be read in evidence in any case in which the death penalty is authorized by law but is not mandatory, whenever the convening authority shall have directed that the case be treated as not capital, and in such a case a sentence of death may not be adjudged by the court-martial."

amended to allege manslaughter in violation of Art. 119, and the accused pleads guilty to the reduced charge. CM 396739, *Cynthia P. Tyler.*

Are those two cases to be regarded as capital or as non-capital for purposes of the jurisdictional distinction now urged by the Government? In *Brillhart,* the question was never formally decided, but is a fact that, soon after the decision in *Reid* v. *Covert,* 354 U.S. 1, the unexecuted portion of the sentence was remitted, and Mrs. Brillhart was released.

In *Tyler,* two members of the Army Board of Review held that there was no military jurisdiction over dependents for non-capital offenses, while a third member held simply that there was no jurisdiction in the particular case saying (p. 7, Board of Review opinion): "Having no jurisdiction over the offense in the first place, the convening authority had no power to direct that the case be tried as non-capital and could not by such a simple expedient give to himself the jurisdiction which the Supreme Court has held could not be granted to him by Congress."

(c) A civilian dependent is charged with and convicted of premeditated murder, a capital offense, and is sentenced to life imprisonment. After the conviction is reversed, rehearing is directed; in view of Art. 63(b), UCMJ and MCM ¶15*a*(3), *supra,* p. 52), the case now is non-capital. Before the rehearing is had, the accused seeks release on habeas corpus. That was precisely the situation in *Reid* v. *Covert,* 354 U.S. 1; see No. 701, Oct. T. 1955 (R. 2, ¶¶ 11; R. 8, ¶¶VIII, IX; R. 12, 95-96, 97. Yet this Court held that the case was capital, and that there was no jurisdiction to try Mrs. Covert by court-martial.

(d) On occasion, a civilian dependent may be charged with unpremeditated murder in violation of Art. 118(2)

and, on her offer to plead guilty, the charge will be reduced to one of manslaughter in violation of Art. 119. That is the present case; see R. 51-56, R. 10-12. Compare *Tyler, supra*, pp. 52-53.

Curiously enough, the Government's Statement in its brief herein (U.S. Br. 3-4) nowhere mentions that Mrs. Dial was originally charged with the more serious offense.

(e) It must also be borne in mind that while the Code's distinction between premeditated murder in Art. 118(1) and unpremeditated murder in Art. 118(2) is that between one who "has a premeditated design to kill" and one who "intends to kill or inflict great bodily harm," the Court of Military Appeals, disregarding the binding (see Art. 36(a), UCMJ) effect of federal decisions to the contrary (*Bullock* v. *United States*, 122 F. 2d 213 (App. D.C.); *Jones* v. *United States*, 175 F. 2d 544 (C.A. 9)), has completely blurred the distinction by espousing the concept of "instantaneous premeditation." *Sechler*, 3 USCMA 363; cf. *McMahan*, 6 USCMA 709, 716.

In other words, the capital/non-capital distinction is not only essentially unworkable in the area of homicide; but it would place into the hands of a military officer, the convening authority, an unreviewable discretion to exercise jurisdiction over civilians simply by down-grading the offenses for which he will try them. No dependent placed on trial before a court-martial on a charge of unpremeditated murder has yet been sentenced to death. Therefore, by charging the offense as unpremeditated murder under Art. 118(2) or as manslaughter under Art. 119, approval of the distinction now urged by the Government would, as a practical matter, extend military jurisdiction over every civilian dependent charged with homicide. And, since but few of the other capital offenses enumerated in the

Code (MCM ¶15*a*(2), quoted *supra*, pp. 51-52) can or will ever be committed by dependents, approval of the distinction would, in substance and effect, amount to a nullification of *Reid* v. *Covert*.

5. *The Government in several cases decided subsequent to* Reid v. Covert *has acted on the assumption that the purported jurisdictional distinction is untenable.*

In several instances that we have found, all of them subsequent to *Reid* v. *Covert*, the Government acquiesced in rulings holding that there was no military jurisdiction to try civilian dependents for non-capital offenses.

(a) In *Louise Smith* v. *Kinsella*, S.D.W.Va., H.C. No. 1963, the court below freed on habeas corpus a civilian dependent who had been tried by a court-martial for a non-capital offense; see the references in the opinion below in the present case at R. 63, 64, 67. The judgment was entered on August 12, 1957; the Government did not appeal.

(b) In CM 396739, *Cynthia P. Tyler*, *supra*, pp. 52-53, an Army Board of Review held that where a civilian dependent, charged with a capital offense, had her case treated as non-capital by direction of the convening authority, pursuant to Art. 49(f), UCMJ, *supra*, note 12, p. 52, in order to permit the use of depositions by the prosecution, the case was capital for jurisdictional purposes, so that the conviction could not be sustained. The Judge Advocate General of the Army did not seek review of that ruling by certifying the case to the Court of Military Appeals under Art. 67(b)(2), UCMJ, as he might have done.

(c) In *Emma Cheaves* v. *Wilber M. Brucker, Secretary of the Army*, D.D.C., H.C. No. 100-58, the petitioner, a civilian dependent in Germany, sought release from mili-

tary custody where she was being held under a charge of unpremeditated murder in violation of Art. 118(2), a non-capital offense. The Government opposed only her return to the United States, a step which would have precluded her trial by any court. On September 29, 1958, Judge Letts granted the petition "to the extent of ordering the release from military custody of petitioner in Frankfurt am Main, in the Federal Republic of Germany." The Secretary of the Army, respondent in the proceeding, did not appeal, and Mrs. Cheaves was thereafter tried by a German court. Washington *Evening Star,* May 26, 1959, p. B-11.

(d) A fourth case, *Madelyn E. Hitt* v. *Neil H. McElroy, Secretary of Defense,* D.D.C., H.C. No. 29-58, was slightly different. There Mrs. Hitt was charged by the Air Force under Art. 118, UCMJ, with the premeditated murder of her infant son on Okinawa. She was not a civilian dependent, but was the wife of a civilian employee of the Philco Corporation, who was assigned to the Kadena Air Base. Mrs. Hitt's petition was filed on April 7, 1958. Thereafter, on April 11, the U.S. Commissioner for the District of Columbia, issued a fugitive warrant, charging a violation of 18 U.S.C. §1111 within the special jurisdiction set out in 18 U.S.C. §7; the charge under Art. 118, UCMJ, was withdrawn; and Mrs. Hitt was confined pursuant to a commitment order issued by the Judge of the U.S. Civil Administration of the Ryukyu Islands. Accordingly, after finding that the petitioner was not in custody pursuant to any charges arising out of the Uniform Code, Judge Curran on April 21, 1958, dismissed the application for the writ, and discharged the rule to show cause.

Whether the disposition of the first three cases noted above amounts to acquiescence by the Government in important rulings in the administration of the criminal law sufficient to shape interpretation (cf. *Andres* v. *United*

*States,* 333 U.S. 740, 756) need not be determined. But that disposition plainly shows that the capital/non-capital distinction that the Government now so vigorously espouses is an afterthought. And, as the foregoing discussion has amply demonstrated, it is an afterthought with the usual infirmities attaching to such delayed action cerebrations.

E. *Historical materials emphasize the lack of foundation for military jurisdiction over civilian dependents in time of peace.*

Here, as on the *Covert-Krueger* rehearing, the Government adduces a mass of so-called historical materials. Here, as there, those materials omit a good deal and in many instances are badly misread. Far from reflecting "a solid basis" (Pet. Br., No. 21, p. 28) or a "well-established practice" (U.S. Br., this case, p. 15) for the exercise of military jurisdiction over civilian dependents in time of peace or indeed anywhere but "in the field" in a time and at a place where military operations are being carried on, the totality of the available historical evidence, once it is examined in the light of accepted historical techniques, establishes precisely the contrary of what the Government seeks to show in the course of its present efforts, efforts which even sympathetic commentators have characterized —we hope with reason—as "a losing rear-guard action." 71 Harv. L. Rev. at 713.

Under the present heading, we restrict ourselves largely to the evidence dealing with trials by court-martial of civilian dependents, together with some general observations as to the proper approach. The bulk of the evidence dealing with military trials of civilians concerns employees, and so is treated in the petitioner *Wilson's* brief in No. 37. English materials are dealt with there, and, in part below at pp. 68-81.

1. *No civilian dependents were ever tried by any American court-martial under the Constitution prior to 1950.*

The Government does not cite, and counsel for Mrs. Dial have not found, any instance of a civilian dependent tried by an American court-martial under the Constitution prior to 1950. The Government does not cite any instances of any civilian women tried or punished by an American court-martial under the Constitution prior to 1950; we have found two, of a nature that hardly supports the Government's views.

(a) We refrain, advisedly, from exploring Colonial practices; they are not safe guides. Certainly the trials by court-martial directed by Governor Berkeley after his suppression of the Bacon Rebellion (see Washburn, *The Governor and the Rebel* (1957) 89-91) do not provide "a solid basis" for similar excesses today.

This Court has held that Colonial price-fixing laws do not measure the scope of modern police power. See *Wolff Packing Co.* v. *Court of Industrial Relations,* 262 U.S. 522, 537. (Nothing said in *Nebbia* v. *New York,* 291 U.S. 502, it should be noted, turned on Colonial precedents.)

And the provision in Art. 13 of the Virginia Bill of Rights (9 Hening, Stat. 109, 111), which states "that standing armies, in time of peace, should be avoided, as dangerous to liberty," assuredly does not measure constitutional power today; indeed, the circumstance that the Constitution did provide for just precisely what the earlier document had denounced was one of the reasons why the latter's author, George Mason, refused to sign the Constitution. 2 Farrand, 640.

(b) The Government lists two trials by brigade court-martial of soldiers' wives, at Valley Forge in 1778 (Br. 25),

proceedings that, as the *Writings of Washington* show, were not submitted to the Commander in Chief. Those women, plainly, were with the army in the field, in time of war; their cases were therefore within the single area of unquestioned military jurisdiction over civilians (*supra*, pp. 28-33); and their cases accordingly do not support the vastly greater jurisdiction now contended for by the Government.

All the rest of the Government's history (Br. 16-26) simply documents what was indeed well known, that in the Eighteenth Century and for a long time thereafter women customarily accompanied an army on the march. Indeed, the practice continued, in one form or another, for nearly a century. It received statutory sanction in 1802 (Sec. 5 of the Act of March 16, 1802, c. 9, 2 Stat. 132, 134) to the extent of allowing four women per company, each of whom was allowed a ration, to accompany the troops as laundresses. These provisions were duly carried into the Revised Statutes; see R.S. §§1240, 1295. Not until 1878 did Congress finally declare "That hereafter women shall not be allowed to accompany troops as laundresses." Sec. 5 of the Act of June 18, 1878, c. 263, 20 Stat. 145, 150; 10 U.S.C. [1926 through 1952 eds.] §664; omitted as obsolete in 1956, see Sen. Rep. 2484, 84th Cong., 2d sess., p. 1020.

Nevertheless, none of those women appear to have been tried by court-martial, and all the Government can show is two trials of soldiers' wives during the Revolution.

We submit that a mere two such trials in a conflict that lasted longer than any subsequent war in which the United States was engaged hardly establish a settled practice, particularly since, as in those instances, the cases fell within what is now Art. 2(10) (*supra*, p. 28) and could not by any stretch of imagination be included within the

present Art. 2(11). And, in fact, no civilian dependent was tried by court-martial between 1778 and 1950. The Government has found no instances in that 172 year interval in which any civilian women were punished by the military; we can produce two, which however do not advance the Government's arguments.

(c) In 1795, at West Point, a woman not shown to have been the dependent of anyone in the garrison, was whipped without trial. Here is the General Order of 31st July 1795, as recorded in 1 *Orderly Book of the Corps of Artillerists and Engineers* 73-74 (MS., U.S.M.A. Library, West Point, N.Y.).

> "Whereas a woman by name Polly Toomy has been drummed out of the Garrison three times; that the last being yesterday evening she has again returned the same night in defiance of the Garrison orders.
>
> "The Commandant orders that to preserve in this Garrison good order which she infringes upon [,] the said Polly Toomy shall be drummed out again and receive twenty lashes on her bare back, care being taken that her breast shall not be injured.
>
> "The Commandant declares that if she infringes again the orders she will be punished very severely as being a disgrace to society.
>
> "Lewis Tousard."[13]

The other three volumes of *Orderly Books of the Corps of Artillerists and Engineers,* which together with vol. 1 extend from May 7, 1795, to May 19, 1799, have likewise been examined; they reflect no further instances of women being either tried or punished without trial.

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[13] Tousard was a Frenchman by birth who had served in the Continental Army and was at this time a Major. 1 Heitman, 966.

(d) The Orderly Books of Maj. Gen. Anthony Wayne, Commanding General from 1792 to 1796, appear at 34 Mich. Pioneer & Hist. Coll. 341, except for the period Nov. 17, 1792 to 11 April 1793; the missing entries are in manuscript in the library of the Historical Society of Pennsylvania in Philadelphia, and have been examined there.

No trials of women are recorded during the entire period, and the only reference to women appears in a General Order of Dec. 22, 1792, Head Quarters Legionville (in Pennsylvania, on the Ohio River N.W. of Pittsburgh, now in Harmony Tp., Beaver Co.; see map in Wildes, *Anthony Wayne* (1941) 361). That order, after prohibiting the washing of clothes in the creek in the ravine, or anywhere but in the Ohio River, goes on to state:

> "Should any woman or women or other person violate this order, by washing in that ravine—the person or person's so offending—shall be ducked in the river three times for each and every offence."

No action in furtherance of this threat is noted.

As is set out in greater detail in the petitioner *Wilson's* brief in No. 37, Wayne was frequently in conflict with civil authority in Pittsburgh (and elsewhere), and indeed issued an order at this time detailing one of his officers to regulate the prices asked by the inhabitants for their wares because "the market has been forestalled."

Actions taken by Anthony Wayne, therefore, are hardly safe authority when tracing the constitutional limits of military power. Nor, as will be seen, were those of his successor, Brig. Gen. James Wilkinson.

(e) General Wilkinson's orders, from December 31, 1796, to April 23, 1808, appear in the *Wilkinson Order Book* (MS., National Archives), which has been examined.

No trials of civilian dependents appear therein.

One woman, described as a follower of the Army, was tried in the following circumstances:

On July 12, 1797, General Wilkinson issued a General Order from his headquarters, then at "D'Etroit," which stated that "All persons are hereby prohibited selling liquor of any kind to the Troops, except under the written permission of Lieut. Colonel Commandant Strong—the infraction of this order by whosoever committed, shall be punished by the guard House, and the sentence of a General Court Martial." *Wilkinson Order Book* 48.

The foregoing General Order also stated (*id.*) that "Any person attempting to inveigle a soldier from his duty, or in advising him to desert shall receive Fifty lashes, and be drummed out of the fortifications."

On July 20, 1797, a General Court Martial tried three civilians for a violation of the first portion of the foregoing General Order: William Mitchel, a Suttler, Lydia Conner, a follower of the Army, and James Fraser, a Merchant of D'Etroit. With respect to the woman, here are the proceedings as recorded (*id.*, pp. 58-60):

> "3d Lydia Conner a follower of the Army charged with a Violation of the General Order of the 12th Instant pleads not Guilty.
>
> "The Court find the prisoner guilty of the charge exhibited against her, and sentence her, under the General order of the 12th Instant, and the 23 article of the 13 Section of the rules and articles of War, to be drummed with a bottle suspended about her neck, with the rogues March (together with William Mitchel a prisoner convicted of the like Offence, her right hand tied to his left), through the Citadel in front of the Troops paraded, thence through the Streets of the

Town; thence to and around the front of the barracks of the Soldiery in Fort Lernoult,[14] thence out of the Fort, to and along the main Street, and out of the West or South West gate of the town, not to return therein, or within the lines or fortifications of the troops of the United States, on penalty of receiving such punishment as may be inflicted upon her by sentence of a Court Martial. * * *

"The Commander in Chief approves these sentences * * * .

"The Sentence passed upon Lydia Conner, a notorious offender, is to be carried into execution at 6 O'Clock this afternoon."

On July 28, 1797, two more civilians, apparently unconnected with the Army, were tried, one for "enticing and endeavouring to persuade" a soldier to desert, another for selling liquor in violation of the July 12 General Order. *Wilkinson Order Book* 66.

On September 11, 1797, another sutler was tried for improperly selling liquor to soldiers, but was acquitted. *Wilkinson Order Book* 79.

These examples of trials of civilians by court-martial, far from reflecting a settled practice of subjecting camp followers to military jurisdiction, show instead an utterly illegal assumption of legislative and judicial power over civilians. Not only had Congress made the enticing of soldiers to desert a civil offense (Sec. 15 of the Act of May 30, 1796, c. 39, 1 Stat. 483, 485) but Detroit itself was not an unsettled place at this time. To the contrary, it had magistrates and a sheriff. See 2 *The John Askin Papers*

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[14] Named after Major Lernoult of the Revolutionary Army. 1 *Burton Historical Collection Leaflet*, No. 3 (Detroit Public Library, March 1922).

(Quaife ed. 1931) 112-114. There were also civilian justices across the river in Upper Canada, whose help Gen. Wilkinson unsuccessfully sought in apprehending deserters. 2 *id.* 115-117, 118-119.

Some of Wilkinson's interferences resulted in his being sued (2 *id.* 165, note 66), and thereafter either he or a subordinate following his example clashed with higher authority. On March 22, 1799, Secretary of State Pickering wrote Gov. St. Clair of the Northwest Territory as follows (3 *Terr. Pap. of the U. S.* 20-21),

> "The President [John Adams] is absent, in Massachusetts: but I suppose the Secretary of War (to whom I will communicate your letter) can correct the error of the commanding military officer at Detroit, in proclaiming military law, and threatening the inhabitants with punishment by court-martial."

The conclusion fairly to be drawn from the foregoing examples is, not that there was a well established military jurisdiction over a narrow class of civilians accompanying the forces in areas where no civil judicature existed, but rather that General James Wilkinson was a headstrong man, who brooked no interference with his directions; who purported to legislate for the conduct of civilians and assumed military jurisdiction over offenses that Congress had declared punishable only in the civil courts; and who either knew nothing or cared nothing about the boundary within which the Constitution's double guarantee of jury trial had contained the jurisdiction of courts-martial.

Other trials of civilians recorded in the *Wilkinson Order Book*, none of which involved women, are set forth in the *Wilson* brief in No. 37.

(f) Winthrop, whose last edition was published in 1896, collected therein (pp. *131-*137) all of the trials of civilians

found in published court-martial orders up to that date. No trial of any American civilian dependent is listed, nor any of a non-dependent woman.

(g) The only contemporary text on the military law of the Confederacy indicates that trials of civilian dependents were never had or even contemplated by the Confederate States Army. See Lee, *The Judge Advocate's Vade Mecum* (Richmond, 1863) §22:

> "Where offences of a purely military character are committed by such persons, such as insolence to a commissioned officer, disobedience, or neglect of duty, though a court martial could not take cognizance of them, the offender may, nevertheless, be frequently sufficiently punished by dismissal from the camp * * *."

A striking instance of the limitations placed by the courts of the Confederacy on military trials of civilians other than dependents is discussed in the *Wilson* brief in No. 37.

(h) In June 1945, The Judge Advocate General of the Army compiled a long list of instances of civilians tried by court-martial under AW 2(d) of 1916 and 1920 and its statutory predecessors. 4 Bull. JAG 223-229. All were wartime cases, although some probably unduly stretched the concept of "in the field." In no instance there collected had any civilian dependent been tried by court-martial.

(i) In 1947, after the declared end of World War II hostilities (see Jt. Res. of July 25, 1947, c. 327, 61 Stat. 449), The Judge Advocate General of the Army "made a policy decision that military jurisdiction over such dependents [i.e., wives and children of service personnel] would not be exercised in spite of the fact that they were 'accompanying . . . the armies of the United States without the territorial jurisdiction of the United States.'" Aycock and

Wurfel, *Military Law Under the Uniform Code of Military Justice* (1955) 60.

(j) The first occasion under the Constitution when the United States Army tried an unarmed dependent wife came in 1950.

"In case number 340593 Audrey L. Aguaya, a dependent wife, was tried in Japan on 10 February 1950 on a charge of larceny, committed in December 1949. She was convicted and sentenced to six months confinement, which was suspended. In case number 351230, Fumie Okitsu Hilton, a dependent wife, was tried at Osaka, Japan, on 18 January 1952 for unlawful possession of drugs, an offense committed 11 December 1951. Upon conviction she was fined $100, and sentenced to three months confinement, which was suspended." Respondent's reply brief in *Krueger* v. *Kinsella*, S.D. W. Va., H.C. No. 1726, p. 7.

Both trials seem, quite plainly, to have taken place on an *in terrorem* basis; in any event, they represent the first instances of dependent wives being tried by an American court-martial since the Constitution was adopted.

(k) Since the effective date of the Uniform Code, there has been a veritable rash of such trials.

Otherwise stated, the reversal of the traditional policy with respect to the treatment of dependent wives has taken place under color of the legislation through which Congress sought to meet and dispose of continuing criticisms of the administration of military justice. Thus there is presented this unedifying paradox, that whereas for over 170 years no civilian dependent of any American serviceman was ever tried by an American court-martial, now, in consequence of a reformed procedure and jurisdiction evoked by persistent criticism of military trials of persons in uniform, civilian wives have in fact been tried by court-martial—and will

continue to be so tried for most offenses unless the judgment below in this case is affirmed.

The significant point of the foregoing survey is that, *non constat* the Government's arguments (Br. 16-26), there is no historical support whatever for the exercise of military jurisdiction over civilian dependents in time of peace, in respect of any offenses whatever.

Indeed, our views are identical with the conclusions urged on this Court by the Government in *Madsen* v. *Kinsella*, 343 U.S. 341. There the Government, after thorough consideration of the authorities, came to precisely the same conclusion that we do as to the extent of the pre-1916 court-martial jurisdiction over civilian dependents. Here are pertinent extracts from its brief (No. 411, Oct. T. 1951):

> "* * * we will demonstrate that courts martial probably never possessed jurisdiction over the wives and dependents of a soldier, or over any civilian except during a time and in the vicinity of military operations, and that, in any event, prior to 1916 courts martial never had jurisdiction to try a soldier's wife or any other civilians for murder or any of the other serious civil crimes enumerated in Art. 58 of the pre-1916 Articles of War" (p. 30).
>
> "Petitioner's contention that the wives of soldiers were subject to trial by court martial prior to 1916 under the former AW 63 [of 1874; Winthrop, *1531 (reprint, p. 991)] is inconsistent with the terms and construction of that article, and is based upon dubious authority" (p. 44).

Particular attention is directed to Point IB2 of that brief (pp. 40-45), which bears the heading, "Prior to 1916, courts martial probably lacked jurisdiction over any civilians except in an area of combat operations, and clearly were with-

out jurisdiction over soldiers' dependents bearing no relationship to the army as a fighting force." We commend that discussion to the Court, not by way of debating point, not to impeach an adversary with prior inconsistent statements, but because those pages contain a reasoned and accurate exposition of the pre-1916 military jurisdiction over civilians, and because the conclusions there set forth are those which any objective lawyer, familiar with the materials, is bound to reach.

We should add, those are similarly the conclusions that any competent historian would reach from the historical evidence: That evidence shows precisely four instances, all prior to 1800, of women being punished by the United States Army: Two trials of women at Valley Forge, in the camp of the Continental Army during the midst of the Revolutionary War; one woman flogged without trial at West Point in 1795; and one woman drummed out of camp at Detroit in 1797, in a community where civil magistrates were sitting.

The first two instances fell clearly within the limited wartime exception already discussed at length; the second two were palpably illegal. Yet that is the "solid basis" (Pet. Br., No. 21, p. 28) and "well-established practice" (U.S. Br., this case, p. 15) on which the Government now relies to sustain military jurisdiction over civilian dependents in time of peace!

2. *The English precedents do not reflect any wider jurisdiction.*

The Government's treatment of selected English "historical" precedents (Pet. Br., No. 21, pp. 28-33; U.S. Br., this case, pp. 16-23) requires that those materials be supplemented and, above all, viewed in their proper setting and not in a vacuum.

At the outset, it is well to recall an accepted paradox of American constitutional law, that while "the provisions of the Constitution * * * are organic living institutions transplanted from English soil" (*Gompers* v. *United States*, 233 U.S. 604, 610), the state of the English law from 1776 to 1789 is frequently not an accurate measure of the meaning of the Constitution of the United States. Examples that come readily to mind are the guarantee of the right to counsel in its due process setting (*Powell* v. *Alabama*, 287 U.S. 45), as compared with the English practice, where prior to 1836 (St. 6 & 7 Will. IV, c. 114) only persons accused of treason were permitted counsel; and the extent to which government may impinge on the freedom of the press (*Grosjean* v. *American Press Co.*, 297 U.S. 233, 248-249), where the English law of libel was held not to measure the breadth of the First Amendment's guarantee as carried into the Fourteenth.

Similarly, it is necessary to be circumspect in attempting to read into American constitutional law all of the British holdings and practices relating to military jurisdiction. Even though, as is well known, the first American Articles of War were taken verbatim from a British counterpart, British institutions and ours were so significantly different even at the outset, that it is neither safe nor accurate to pursue analogies to their logical limits. And this is still so, even though (as will be shown) the scope of British military jurisdiction over dependents was not in any sense wider than ours prior to 1957. Today, of course, in a number of respects enumerated below, British military jurisdiction is markedly different from that which obtains under the Constitution of the United States.

(a) John Adams, who drafted the 1776 Articles of War that were adopted by the Continental Congress, copied them almost literally from their British prototypes. 3

*Works of John Adams* (C. F. Adams ed. 1851) 68-69, 83-84. (He had earlier drafted the Continental Articles for the Government of the Navy. 1 *id.* 188; 3 J. Cont. Cong. 277.).

It is unnecessary in this connection to determine whether Adams' model for the American Articles of War of 1776 were the British Articles of 1765 or those of 1774 (cf. Davis, *A Treatise on the Military Law of the United States* (3d ed. 1915) 340-341, espy. 341, n. 1), inasmuch as the British provisions dealing with military jurisdiction over civilians were the same in both sets. They read as follows:

> "All Suttlers and Retainers to a Camp, and all Persons whatsoever, serving with our Armies in the Field, though no inlisted Soldiers, are to be subject to Orders according to the Rules and Discipline of War."

(Section 14, Art. 23 of the British Articles of 1774, Davis, *supra*, p. 593; Section XIV, Art. XXIII, of the British Articles of 1765, Winthrop *1461.)

This provision, with the sole substitution of "armies of the United States" for "Our Armies," became Art. 23 of Section XIII of the American Code of 1776 (*infra*, p. 113).

The scope of the British provision as actually applied was, like that of the American one (*supra*, pp. 28-33), limited to civilians "in the field," a phrase of art that meant a time and place where military operations were actually in progress. As we shall show, not a single one of the precedents adduced by the Government extends beyond that limitation.

(b) Arguments by analogy from other provisions of the British Articles of War, however, cannot be carried farther, for while the power to enact Articles of War was in the United States always vested exclusively in Congress (Articles of Confederation, Art. IX, ¶4; U.S. Const., Art. I,

Sec. 8, Cl. 14), in England that power was divided between the King and Parliament. Parliament enacted the so-called statutory articles; the King prescribed what became known as prerogative articles.

The English development in this respect is conveniently traced in the 1929 edition of the British War Office's *Manual of Military Law*, pp. 12-14. The short of a long history is that the Mutiny Act and the statutory articles regulated the Army at home, while the troops abroad were governed by the prerogative articles.

In 1766, it was held in *Barwis* v. *Keppel*, 2 Wils. K. B. 314, that the King's power overseas was unlimited. That was an action by a sergeant against a major for wrongfully reducing him to the ranks while serving in Germany. The Court held that it had no jurisdiction whatever, saying (p. 318):

> "By the Act of Parliament to punish mutiny and desertion the King's power to make articles of war is confined to his own dominions; when his army is out of his dominions, he acts by virtue of his prerogative, and without the statute or articles of war; and therefore you cannot argue upon either of them, for they are both to be laid out of this case, and flagrante bello, the common law has never interfered with the army: inter arma silent leges. We think (as at present advised) we have no jurisdiction at all in this case; * * * "

Not until 1803 (St. 43 Geo. III, c. 20) were the Mutiny Act and the statutory Articles of War extended to the army whether within or without the King's dominions. By that act, as well as in 1813 by Sec. 146, St. 53 Geo. III, c. 17, the prerogative power of making Articles of War in a time of war was finally superseded by a statutory power.

Very plainly, the existence of an untrammeled royal power outside the realm does not yield arguments that are either useful or helpful when sought to be applied here, where "The Constitution of the United States is in force * * * wherever and whenever the sovereign power of that government is exerted." *Balzac* v. *Porto Rico*, 258 U.S. 29, 312; and see *Reid* v. *Covert*, 354 U.S. 1, 5-6, 12, 42, 66-67. Accordingly, the British provisions cited and relied upon by the Government at Pet. Br., No. 21, pp. 32-33, 53, which on their face purport to grant a broader power overseas, are completely inapposite in the four cases now before the Court.

(c) Yet there was an Act of Parliament—not cited by the Government—which advisedly refused to extend military jurisdiction over civilians at forts or garrisons in the sparsely settled portions of the vast regions of North America to which British title was perfected by the Peace of 1763. That Act, instead, required military commanders to turn civilian offenders over to the civil authorities in the nearest adjoining colony. That is to say, the Act waived only venue, and preserved civilian trials for civilian offenders.

The St. 5 Geo. III, c. 33 (1765) was entitled "An Act to amend and render more effectual, in His Majesty's Dominions in *America*, an Act passed in this present Session of Parliament, intituled, *An Act for punishing Mutiny and Desertion, and for the better Payment of the Army and their Quarters.*"

Sec. XXV of this Act was as follows:

> "And whereas several Crimes and Offences have been, and may be, committed by several Persons, not being Soldiers, at several Forts or Garrisons, and several other Places within His Majesty's Dominions in

*America*, which are not within the Limits or Jurisdiction of any Civil Government there hitherto established; and which Crimes and Offences are not properly cognizable, or triable and punishable, by a Court-martial, but by the Civil Magistrate; by Means whereof several great Crimes and Offences may go unpunished, to the great Scandal of Government; For Remedy whereof, be it further enacted * * * That * * * if any Person or Persons, not being a Soldier or Soldiers, do or shall commit any Crime or Crimes, or Offence or Offences, in any of the said Forts, Garrisons, or Places, within His Majesty's Dominions in America, which are not within the Limits or jurisdiction of any Civil Government hitherto established, it shall and may be lawful for any person or persons to apprehend such Offender or Offenders, and to carry him, her, or them, before the Commanding Officer for the time being of His Majesty's Forces there; and such Offender being charged upon Oath in Writing, before the said Commanding Officer, and which Oath the said Commanding Officer is hereby impowered to administer, that then, and in every such Case, the said Commanding Officer shall receive and take into his Custody, and safely keep, every such Offender, and shall convey and deliver, or cause to be conveyed and delivered, with all convenient Speed, every such Offender to the Civil Magistrate of the next adjoining Province, together with the Cause of his or her Detainer, to be committed and dealt with by such Civil Magistrate or Magistrates according to law; and every such Civil Magistrate is hereby commanded and required to commit every such Offender, that he or she may be dealt with according to Law; and in every such Case, it shall and may be lawful to prosecute and try every such Offender in the Court of such Province or

> Colony, where Crimes and Offences of the like Nature are usually tried, and where the same would properly be tried in case such Crime or Offence had been committed within the Jurisdiction of such Court; and such Court shall and may proceed therein to Trial, Judgment, and Execution, in the same Manner as if such Crime or Offence had been really committed within the Jurisdiction of such Court; any Law, Usage, Custom, Matter, or Thing whatsoever to the contrary notwithstanding."

The foregoing Act was several times extended; see St. 6 Geo. III, c. 18; St. 9 Geo. III, c. 18.

It is hardly necessary to add that the quoted statutory provision completely demolishes the Government's arguments that the British Articles of War of 1765 "applied to all 'persons' under the command of the Commanding Officer, in time of peace as well as war," "where there is no Form of our Civil Judicature in Force" (Pet. Br., No. 21, p. 53), or that "the historical concept of 'in the field' does not turn on peace or war but rather on the location of the military as a group apart in a defensive or offensive posture, or away from its own civil jurisdiction."

(d) The Government cites Clode, *Military Forces of the Crown* (1869), see Pet. Br., No. 21, pp. 29, 30, 32, but wholly overlooks some highly pertinent passages from the same learned author's other work, *The Administration of Justice under Military and Martial Law* (1st ed. 1872; 2d ed. 1874). Accordingly, we supply those excerpts here (pp. 94, 95, 2d ed. 1874):

> "However, for many years (from 1744 to 1828) the Articles of War declared all 'Sutlers and Retainers to a camp to be subjected to the rules and discipline of War,' though it was clear from the Law Officers' Re-

port in 1744-5 that they could not be punished by Court-martial, because they were neither designated in the Articles nor were they Officers or Soldiers. Had the Crown see fit to commission or enlist—or even to pay them 'as Officers or Soldiers'—this liability would then have attached to them. [Citing *Grant* v. *Gould*, 2 H.Bl. 69.]

* * * * * * *

"From what has already been written, the reader, perhaps, need not be cautioned against supposing that all those who are resident or commorant within a Camp or Barrack are thereby rendered liable to trial by Court-martial. Such a liability must be found upon the Statute Book in plain and explicit words leaving nothing to inference. [Citing *Looker* v. *Halcomb*, 4 Bing. 183, 188-189.]"

and, in the United States, must be found in the Constitution.

The foregoing passages from Clode make it plain that the quotation from Samuel, *Historical Account of the British Army, and of the Law Military* 691-692 (Pet. Br., No. 21, pp. 31-32), must be read with caution, and that it applies, as indeed no doubt it was intended to apply, only to the situation existing "in the field."

(e) Certainly it is plain that every case of the trial by British court-martial of a civilian dependent or of a woman prior to 1789 cited by the Government in this case (Br. 20-23) falls within the narrow "in the field" limitation always rigidly insisted on by American military lawyers prior to 1916.

For reasons already set forth above, p. 59, no particular significance attaches to the undoubted fact that women regularly accompanied the British Army through at least the Peninsular War. Such women were of course

issued rations—plainly they would not be permitted to starve—and they were subject to regulation of their activities, as indeed today the commanding officer of every American military installation regulates and prohibits many actions of dependents living on the post without having the slightest power to try them by court-martial.

What is significant in the present connection is, accordingly, only the nature and extent of the military jurisdiction that was exercised over these British women.

(i) Six of the cases cited by the Government (U.S. Br. 22-23) were, on their face, instances occurring in time of war and "in the field."

(ii) Another case, the trial of a soldier's wife in Boston in December 1775 (U.S. Br. 22), took place when the British forces in that town were besieged by the Continental Army (Spaulding, *The United States Army in War and Peace*, 36-40, 44-46), and after General Gage, the British commander and, simultaneously, Governor of the royal Province of Massachusetts Bay, had declared martial law in a proclamation which recited that the civil courts were not functioning. Force, *American Archives*, Fourth Series, Vol. II, 968, 970.[13]

In terms of modern concepts, this was an appropriate martial law situation, a trial by military tribunals at a time when disorders had closed the common law courts.

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[13] "And whereas, during the continuance of the present unnatural rebellion, justice cannot be administered by the common law of the land, the course whereof has for a long time past been violently impeded, and wholly interrupted (from whence results a necessity of using and exercising the Law-Martial), I have therefore thought fit, by the authority vested in me by the Royal Charter to this Province, to publish, and I do hereby publish, proclaim and order the use and exercise of the Law-Martial, within and throughout this Province for so long time as the present unhappy occasion shall necessarily require; * * * ." The date of the Proclamation was June 12, 1775.

Cf. *Duncan* v. *Kahanamoku*, 327 U.S. 304. But, apart from that aspect, which as sought to be applied to the 1770's might involve inadmissible after-thinking, it is plain that Boston in the last half of 1775 was under siege, that there was shooting, and that hence, here also, the trial took place in a time of war "in the field" (*supra*, pp. 28-33).

Another Boston trial from the same period of siege (U.S. Br. 20) is quoted from Blumenthal, *Women Camp Followers of the American Revolution* 42, without any indication of its source. The case is not further documented, either by the author of that distinctly less than authoritative work, or by the Government. If we are safe in assuming that this particular example was accurately transcribed by Mr. Blumenthal from an authentic original, then obviously it falls into the same category as the one just discussed, and, very plainly, does not represent an instance of military jurisdiction exercised over civilian dependents in time of peace.

(iii) The two trials of soldiers' wives in Canada in 1760 and 1761 (U.S. Br. 22), did not, as the Government there asserts, occur in time of peace, inasmuch as the French and Indian War did not terminate until 1763. Consequently, since title to Canada had not yet passed to Britain, that region was occupied enemy territory, and accordingly subject to the laws of war, certainly if applied without discrimination. *Madsen* v. *Kinsella*, 343 U.S. 341.

It follows that the jurisdiction exercised by the British prior to 1789 over civilian dependents and women camp-followers is not shown to have extended beyond the "in the field" limitation that was traditional to Colonels Winthrop and Dudley, to General Davis, and to all Attorneys General and Judge Advocates General prior to 1916.

The Government's attempt to draw a wider significance from this handful of British trials on the basis that, "from

the British point of view at least, there was no war, but merely disorder in the colonies" (U.S. Br. 18-19), breaks down utterly when it is borne in mind that the British accorded full belligerent rights to the American forces, and treated captured American soldiers as prisoners of war, not as traitors levying war against the King. Similarly, although the Civil War took place on domestic soil, the United States at all times extended belligerent rights to the Confederacy (e.g., *Williams* v. *Bruffy*, 96 U.S. 176, 186-187).

Once again, the Government has signally failed to show a "well-established practice" of court-martial jurisdiction over civilian dependents in time of peace.

(f) Thereafter, the British Mutiny Act was always narrowly construed, see *Wolton* v. *Gavin*, 16 Q.B. 48, 61, 70, and accordingly military jurisdiction thereunder was, like that under the American Articles of War prior to 1916, rigidly confined. There was no broadening of that jurisdiction when, late in the XIX Century, the Mutiny Act was superseded, and Articles of War were no longer promulgated. Army Discipline and Regulation Act, 42 & 43 Vict., c. 33; Army Act, 1881, 44 & 45 Vict., c. 58.

The latter measure, now known simply as the Army Act, is annually reenacted in compliance with British constitutional principles, and, by such reenactment is from time to time amended. Under the Army Act, as it was in force down to the end of 1956, certain civilians, not otherwise subject to military law, were so subject as officers if one "accompanies in an official capacity equivalent to that of an officer any of [Her] Majesty's troops on active service in any place" (§175(7)); and the following were so subject as soldiers: "All persons not otherwise subject to military law who are followers of or accompany [Her] Majesty's troops, or any portion thereof, when employed

on active service:" §176(10). The expression "on active service" was defined by §189(1) to mean "whenever he is attached to or forms part of a force which is engaged in operations against the enemy or is engaged in military operations in a country or place wholly or partly occupied by an enemy, or is in military occupation of any foreign country." See *Manual of Military Law, 1951* (H.M.S.O.) 392, 395, 414, giving the text of the Army Act as it then stood.

That is to say, under the British military code, accompanying civilians in occupied territory were subject to military law. Other accompanying civilians were subject thereto only when the force which they accompanied was engaged in military operations. Otherwise stated, until the end of 1956, British military jurisdiction over civilians was identical with ours: *Madsen* v. *Kinsella*, 343 U.S. 341, is the American precedent under the first heading, Art. 2(10), UCMJ, is the American counterpart under the second.

Since both countries had common background of implacable hostility to excesses of military authority, since the written military code of each had an identical starting point, it is therefore hardly surprising that in both countries the boundary between civil and military jurisdiction remained similarly identical for so many, many years.

(g) It is only since January 1, 1957, that accompanying civilians have become subject to British military law under conditions other than "on active service," and even then there are disciplinary provisions which are in terms inapplicable to them. See The Army Act, 1955 (3 and 4 Eliz. II, c. 18) §§209, 213, and Fifth Schedule; The Air Force Act, 1955 (3 & 4 Eliz. II, c. 19) §§209, 211, and Fifth Schedule. But since, of course, the British Parliament is not subject to constitutional restrictions, the traditional bound-

aries of British military jurisdiction are far more significant in the present connection than this very recent expansion can possibly be.

(h) Accordingly, we end our survey of the British law military where we began, with the instances in which it differs markedly from our own. Those differences are particularly notable at the present time.

(1) Thus, notwithstanding the 1955 statutes just cited, American law as to military jurisdiction over dependents is significantly more narrow. *Reid* v. *Covert*, 354 U.S. 1.

(2) The British law has a recapture provision similar to the one declared unconstitutional in *Toth* v. *Quarles*, 350 U.S. 11; see 350 U.S. at pp. 29-31, note 11.

(3) The *Hirshberg* case (*United States* v. *Cooke*, 336 U.S. 210) would have been decided differently as a matter of British law; see the British statutes cited by the Government in that case (Resp. Br., No. 231, Oct. T. 1948, p. 13, n. 4).

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It is a tribute to the Government's perseverance, if not indeed to its professional judgment, that it refuses to abandon, and still puts forward energetically, the trials by court-martial in British India of two reputed wives of soldiers in 1825, and the 1831 "instance in Delhi in which court-martial of an officer's wife *was considered*" (U.S. Br. 27-28; italics ours).

In view of the circumstance that all of these instances came long after the adoption of the Constitution of the United States, and that they involved the application of a special Mutiny Act operative only in India (St. 4 Geo. IV, ch. 81), we think it too plain for argument that they are completely irrelevant here. For, as the Solicitor General told this Court in *Madsen* v. *Kinsella* (U.S. Br., No. 411, Oct. T. 1951, pp. 44-45),

"the status of the wife or alleged wife of an English soldier in India in 1825 has little bearing as to whether the wife of an American soldier was regarded as subject to court-martial jurisdiction then or later."

The circumstance that the Government now stresses the 1825 situation in India which in 1956 it mentioned briefly (Appellant's Br., No. 701, Oct. T. 1955, 34, n. 16), and in 1952 dismissed as irrelevant reflects, we think, not the suddenly inflated significance of the British military jurisdiction in the days of the East India Company's vice-regal sovereignty, but rather the paucity of authorities from any other source that are available for citation in support of the Government's position in the present case.

British Indian military precedents, it should scarcely be necessary to add, are to be treated with caution. After all, that was the service where, after the suppression of the 1857 mutiny, "Mutineers were blown from the mouths of cannon, sometimes alive, or their bodies sewn up in the skins of cows and swine." 4 Churchill, *A History of the English-Speaking Peoples* (1958) 87.

F. *On no permissible view of its scope does the Necessary and Proper Clause expand Clause 14 so as to include civilian dependents within or as a part of the "land and naval Forces" so as to render them subject to military jurisdiction in time of peace.*

One of the issues that divided the Court in *Reid* v. *Covert* was the proper construction of the Necessary and Proper Clause. Under one view then expressed, that Clause could not enlarge the content of "land and naval Forces" in Clause 14. Under another view, the Necessary and Proper Clause must be read as an integral part of each of the preceding 17 clauses of Article I, Section 8.

In our view it is unnecessary to resolve this difference of opinion, because on either footing the result is the same for the present case. For at least three basic reasons, about to be stated, the Necessary and Proper Clause, howsoever construed, does not legalize military trials of civilian dependents in time of peace.

1. *Even if Clause 14 is to be considered as incorporating Clause 18, the combination of both is still amended and limited by the guarantee of jury trial in the Bill of Rights.*

*First.* For present purposes, we assume *arguendo* that Clause 18, the Necessary and Proper Clause, is to be read as an integral part of Clause 14, so that "land and naval Forces" in the latter is deemed to include all others whom Congress and the Executive might deem it desirable to subject to military law. That was, indeed, the argument advanced by the Government at the *Covert* rehearing. There the Solicitor General said,

> "The decision whether civilians overseas are a necessary part of our armed forces and whether practical necessity requires that they be subject to military authority is primarily one for the executive and legislative branches of our government." Supp. Br. for Appellant and Petitioner on Rehearing, Nos. 701 and 713, Oct. T. 1955, pp. 39-40.

But that contention did not prevail, nor could it have, since it ignored the Bill of Rights. The very purpose of the first Ten Amendments, it should hardly be necessary to recall to mind, was to curb the powers of the new central Government, and to forbid encroachments on its part upon carefully particularized areas of basic liberty. As Chief Justice Marshall, himself an active participant in the ratifying process, said in *Barron* v. *Baltimore,* 7 Pet. 243, 250,

> "But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.
>
> "In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States."

Otherwise stated, the Sixth Amendment was adopted to preclude success for the very arguments advanced by the Government in *Reid* v. *Covert*, arguments that it now repeats here.

Plainly, the Sixth Amendment would forbid a joint court-martial of Mrs. Dial and her soldier husband if the offense charged against them had been committed in the United States. We do not understand the Government seriously to assert the contrary, and yet that very concession completely undercuts the notion that the Necessary and Proper Clause so expands the content of "land and naval Forces" as thereby to erode the protections of the Sixth Amendment.

We assume that, after *Reid* v. *Covert*, it is no longer necessary to explain that the constitutional position in this

respect is not varied by the circumstance that the United States in this case sought to try one of its civilian citizens without a jury at an overseas location.

*Second.* This Court has repeatedly held, the last time only two Terms ago (*Green* v. *United States*, 356 U.S. 165), that the right to a jury trial preserves both the scope and the incidents of a jury trial as both stood in 1789. *Callan* v. *Wilson*, 127 U.S. 540; *Thompson* v. *Utah*, 170 U.S. 343; *Rassmussen* v. *United States*, 197 U.S. 516; *Patton* v. *United States*, 281 U.S. 276; *District of Columbia* v. *Colts*, 282 U.S. 63; cf. *Andres* v. *United States*, 333 U.S. 740. Consequently, Clause 18 cannot enlarge the scope of "land and naval Forces" of Clause 14, since to do so would correspondingly diminish the sweep of the Sixth Amendment. Not only must Clauses 14 and 18 be construed together with the guarantee of a jury trial in Art. III, Sec. 2, but, in any event, both are limited by the guarantees of the Sixth Amendment. That construction and, preeminently, that limitation, can only be effectuated by carrying forward without change the boundary between civil and military jurisdiction as that boundary had been authoritatively recognized in 1789 and before, when no American civilian dependent was ever triable—or tried—by court-martial except in time of war and in a theater of actual operations.

In no case of which we are aware has this Court ever held the Necessary and Proper Clause to impinge upon a single personal guarantee contained in the Bill of Rights. True, Congressional power has been enlarged; obstructions to the exercise of such enlarged power have been prevented and punished; and with each increase of Federal power there has necessarily been a corresponding diminution of the power of the several States. Were it otherwise, as Marshall wrote Story a month after *M'Culloch* v. *Maryland*, "the Constitution would be converted into the old Con-

federation" (14 *Proc. Mass. Hist. Soc.*, 2d series, 325). But never, in any decision of this Court of which we are aware, has the operation of the Necessary and Proper Clause been permitted to erode a single one of those personal liberties that were and are guaranteed by the first Eight Amendments.

The proposition just set forth is well illustrated by *McKinley* v. *United States*, 249 U.S. 399. During World War I, Congress authorized the Secretary of War to make regulations to suppress houses of ill-fame in the vicinity of military camps, and plaintiffs in error were convicted of keeping such a house within 5 miles of a camp, in violation of the regulations. Plainly, since Congress is empowered to raise and support armies, it may do whatever is necessary to protect the health and welfare of those armies, however much its legislation and the regulations promulgated pursuant thereto might impinge on what would otherwise be the subject of the police power of the States exclusively. (See *Keller* v. *United States*, 213 U.S. 138.) This Court accordingly sustained the conviction. But it does not follow that the Necessary and Proper Clause could empower Congress to subject the keeper of the house of ill-fame, or its inmates, to trial by court-martial.

The distinction is further illustrated by the Espionage Act cases of World War I, which upheld convictions for attempts to obstruct recruiting by words of persuasion (*Schenck* v. *United States*, 249 U.S. 47; *Frohwerk* v. *United States*, 249 U.S. 204), inciting to insubordination (*Debs* v. *United States*, 249 U.S. 211), and spreading false reports to promote the success of the enemy (*Schaefer* v. *United States*, 251 U.S. 466). See also *Abrams* v. *United States*, 250 U.S. 616. The constitutional basis of the foregoing cases—apart from the scope of the First Amendment, which divided the Court in the last two decisions cited—was that

since Congress had power to raise and support armies and to declare war, it had in addition all power necessary and proper to carry those enumerated powers into execution by punishing obstructions to their exercise. Here again, it does not follow that the Necessary and Proper Clause empowered Congress to try the defendants in question by court-martial—and in respect of activities such as theirs such a course was actually proposed.

In April 1918, Senator Chamberlain, then Chairman of the Committee on Military Affairs, introduced a bill that proposed to declare to be spies, triable by court-martial or military commission, and punishable by death, "any person * * * who shall, anywhere in the United States, in time of war, endanger or interfere with the * * * successful operations of the land or naval forces of the United States, (a) by causing or attempting to cause insubordination * * * or (b) by delivering or transmitting * * * to any member of such land and naval forces any written or printed matter which shall support or favor the cause of the enemy countries or of its allies in the war, or which shall contain any false reports or false statements intended to interfere with the successful operation of such land or naval forces, or (c) by printing or publishing any such printed matter * * *." S. 4364, 65th Cong., 2d sess. See 56 Cong. Rec. 5120, 5401-5402, 5471-5472.

President Wilson wrote of the measure, "I think that it is not only unconstitutional, but that in character it would put us upon the level of the very people we are fighting and affecting to despise. It would be altogether inconsistent with the spirit and practice of America * * *." That killed the bill. Rankin, *When Civil Law Fails*, 138-139.

These illustrations show, we think, both the scope and the limitations of the Necessary and Proper Clause. Nothing in that clause, we submit, can operate to extend the scope

of trial by court-martial at the expense of the guarantee of jury trial.

2. *In view of the widespread hostility to standing armies at the time of the adoption and ratification of the Constitution, it is plain that the Founders did not intend to confer upon the new Government any power to court-martial civilian dependents in time of peace.*

The Government's suggestion (Pet. Br., No. 21, pp. 41-46, espy. 43-44) that what was feared by large segments of the community in 1787-1791 was essentially a standing army in the hands of the executive, and that such fears were allayed once control of the military was entrusted to Congress, again involves a demonstrable misreading of indisputable historical evidence.

Many influential and thoughtful American patriots at that time feared a standing army in any form. Indeed, the distinction now adverted to was only urged by the proponents of the new Constitution after it had been submitted by the Convention to the States, in order to allay the apprehensions of their opposition. E.g., *The Federalist*, No. 24; 5 Elliot 442-443.

Indeed, it is not at all unlikely that, if the supporters of the new instrument of government had even faintly intimated the construction of that document now urged on this Court by the Government, the Constitution would never have been ratified.

*First*: The fragmentary nature of the materials adduced by the Government renders it appropriate that we set forth the historical evidence in detail.

(a) In 1784, Elbridge Gerry offered in the Continental Congress a resolution solemnly declaring (27 J. Cont. Cong. 518) that "standing armies in time of peace, are in-

consistent with the principles of republican Governments, dangerous to the liberties of a free people, and generally converted into destructive engines for establishing despotism." At this time, the standing army numbered 80 men. 27 J. Cont. Cong. 524.

And, since there was no Executive at this time, under the Articles of Confederation, it is plain that Gerry's fears of a standing army were not limited to a force under executive direction.

(b) In the Convention, Elbridge Gerry attempted, for all time, to limit the standing army to two or three thousand men. 2 Farrand, 323, 329, 330; Warren, *The Making of the Constitution*, 482-484.

(c) Luther Martin left the Convention before it completed its work, and then opposed the Constitution because, among other things, it provided for an army in time of peace. 3 Farrand, 207; 12 Dict. Amer. Biog. 344.

(d) George Mason stayed to the end, but refused to sign the Constitution because, among other things, it provided for a standing army. 2 Farrand, 640.

(e) From Paris, where he was American Minister, Jefferson urged a Bill of Rights which would afford "protection against standing armies." 12 *The Papers of Thomas Jefferson* (Boyd. ed.) 438, 440; 13 *id.* 440, 442, 443.

(f) After the Constitution was presented to the States for ratification, numerous amendments were proposed either to prohibit a peacetime standing army altogether or else to permit it only under strict limitations. Thus, Rhode Island, Virginia, and North Carolina each proposed a declaration of rights asserting that standing armies in time of peace were dangerous to liberty (1 Elliot 335 [No. XVII]; 3 *id.* 660 [No. 17]; 4 *id.* 244 [No. 17]). The same

three States proposed amendments against maintaining such forces in the absence of a two-thirds vote by Congress (1 *id.* 336 [No. XII]; 3 *id.* 660 [No. 9]; 4 *id.* 245 [No. 9]). New York proposed an amendment against any standing army except in cases of necessity (1 *id.* 328), and Maryland one to the effect that no mutiny bill should continue in force longer than two years (2 *id.* 552).

(g) After the Constitution went into effect, the enactments of the First Congress for a small increase in the army on the frontiers (Act of Sept. 29, 1789, c. 25, 1 Stat. 95; Act of April 30, 1790, c. 10, 1 Stat. 119) were still assailed by some of the members as utterly unconstitutional. *The Journal of William Maclay* (1927 ed.) 221, 235.

The foregoing six items, (b) to (g) inclusive—most of them not mentioned by the Government—seem to us conclusively to demonstrate that the widespread hostility to standing armies in the United States at the time of the adoption and ratification of the Constitution was in no sense limited to such an army when controlled by the Executive, but existed as well when it was perfectly clear that the standing army was subject to Congressional regulation.

In that setting, if "land and naval Forces" had ever been intended as—or even suspected of being capable of interpretation of—"a broad grant susceptible of expansion under changing circumstances" (352 U.S. at 902); if, specifically, the impact of Clause 18 could ever have been imagined as expanding Clause 14 to include therein, in time of peace, the civilian dependents of land and naval forces, it is simply inconceivable that this possibility would ever have been passed over in silence by all of the articulate anti-Federalists, as in fact it was.

That group was not slow to conjure up lurid pictures of imaginary horribles in respect of the Militia Clause, Clauses

15 and 16; see 3 Farrand 207-209 (Luther Martin); 3 Elliot 47-48, 51-52, 169, 410 *et seq.* (Patrick Henry).[16] The circumstance that no one, whether Federalist, Anti-Federalist, or simply *dubitante*, ever envisaged that the Constitution under any construction rendered civilian dependents triable by court-martial simply because of proximity and dependency, is surely eloquent evidence that no such exercise of military jurisdiction was ever in the contemplation of anyone.

*Second*: The Founders could not have been unaware that, in July 1787, at a time when the Constitutional Convention was in session (Farrand, *The Framing of the Constitution, passim*), the Continental Congress passed the Northwest Ordinance to establish civil government and civil courts in the Northwest Territory, and refused to adopt proposals that would have given courts-martial power to try civilians in that area even temporarily, until such time as the new territorial government was able to function.

The constitutional significance of that determination is highlighted by the dramatic circumstance that both plans, the one urging trials by court-martial, the other proposing the establishment of a system of civil judicature, were presented on the same day.

On July 11, 1787, the Continental Congress received a report on Indian hostilities from General Knox, then Secretary at War (32 J. Cont. Cong. 327-332), which suggested *inter alia* that (*id.*, 330) the commanding officer of the federal troops in the territory of the United States northwest of the river Ohio "should also be empowered to main-

[16] E.g., "Your militia is given up to Congress; all power will be in their own possession." "By this, sir, you see that their control over our last and best defense is unlimited." 3 Elliot's *Debates* 51, 52.

tain the said peace as far as the authority or interests of the United States should be concerned. That for this purpose he should have the power to confine and try all persons who should within the jurisdiction of territory of the United States injure or kill any of the indians or otherwise infract the treaty."

On July 11, 1787, likewise, a committee of the Congress submitted a first draft of the Northwest Ordinance. 32 J. Cont. Cong. 313-320.

On July 13, 1787, Congress adopted the Northwest Ordinance and established a civil government for the Northwest Territory, with a full complement of civil courts. 32 J. Cont. Cong. 334; 2 *Territorial Papers of the U. S.* 39. So significant was this action that, even today, the Northwest Ordinance is regarded as one of the Organic Laws of the United States. See vol. 1, U.S.C. (official 1958 ed.) **xxxvii.**

Six days later, the committee to which General Knox's proposal had been referred submitted a report thereon (32 J. Cont. Cong. 370), which proposed military trials of offenders against the Indians until such time as the government authorized by the Northwest Ordinance should be established (*id.* at 374):

> "And any persons unlawfully passing in the same [the territory of the United States north west of the river Ohio] without such permit or who shall therein murder any indian or injure him in his person or property shall be arrested by the Officers commanding the troops—and tried and punished in all cases prior to the establishment of civil law in the said territory for the prevention of offences, by law martial in the same manner as the regular soldiers are tried and punished for the like offences."

This proposal was debated over several days, somewhat inconclusively, after which it appears to have been referred to the Committee on Indian Relations (32 J. Cont. Cong. 376, 385-387). On July 26, 1787, that committee in turn presented another report, which restated the former proposal in somewhat greater detail. It read in pertinent part as follows (32 J. Cont. Cong. 410-411; 2 *Terr. Pap. of the U. S.* 56-57:

> "* * * but as there is, at present, no system of civil law established in the territory of the United States North west of the river Ohio, whereby the conduct of individuals can be controuled, or their offences or Crimes prevented or punished therein, the committee conceive, that, however it ought, in general, to be an object with Governments to try and punish offenders, not in military service, according to the Course of the civil laws of the land, yet, until such laws can be established in that territory, it is highly expedient, in the present State of things there, to try and punish offenders, who shall make unauthorized attacks upon the Indians, by such laws as can be carried into effect and with such dicision as to Stop the further progress of the lawless proceedings of individuals towards the Indians—
>
> "Wherefore the Committee submit the following resolves.
>
> "Resolved [that anyone found among the Indians in the Northwest Territory without a permit signed by the Secretary at War, the Superintendent of Indian affairs in the Northern Department, or the commander of federal troops or not licensed under the resolve of August 7, 1786 (31 J. Cont. Cong. 490; 2 *Terr. Pap. of the U. S.* 19)] shall be arrested by the officers commanding the federal troops, confined not exceeding 8 days, and sent to the frontiers of one of the States,

and for a second or third offence shall be liable to be Whipped not exceeding forty Stripes—

"And if any person in the said territory not otherwise liable to be punished for his or her offences shall kill, wound, assault or beat any Indian; destroy, secretly, or forceably, take away his or her property without lawful authority such person shall be arrested, confined, tried, and punished in the same manner as the soldiers in the actual service of the United States in the said territory, may be arrested, confined, tried and punished for like offences—and this law for punishing wrongs done to the Indians shall remain in force until other laws shall be made for trying and punishing the same—"

Otherwise stated, successive Committees of the Continental Congress were proposing in 1787 an extension of military jurisdiction over civilians that not even the Parliament of King George III which had passed the notorious Stamp Act (St. 5 Geo. III, c. 12) had been willing to assert in the identical areas twenty-two years earlier; see St. 5 Geo. III, c. 33, quoted *supra* at pp. 72-74.

It will hardly occasion surprise that no further action was taken on a proposal so inconsistent with traditional Anglo-American standards of civil supremacy. For Congress by adopting the Northwest Ordinance had reaffirmed the concept that civilians were entitled to civilian trials, and were not to be subjected, even temporarily, to the jurisdiction of courts-martial, simply because of considerations of expediency or of asserted necessity.

It is appropriate to note that, in fact, the territorial government in the Northwest Territory did not begin to function until July 1788, a full year later (see address of Gov. St. Clair to the inhabitants at Marietta, 3 *Terr. Pap. of*

*the U. S.* 263; and their reply, 2 *id.* 133), and that no crimes act was adopted for the area until September 6, 1788 (1 *Stat. Ohio & N.W. Terr.* (Salmon P. Chase ed. 1833) 97-101). Or, otherwise stated, Congress chose a hiatus of law on the frontier in preference to subjecting civilians there to military law until civil jurisdiction could be established.

The foregoing pattern of Congressional action and inaction in July 1787—of course wholly overlooked by the Government—necessarily undermines completely its present contentions (Pet. Br., No. 21, pp. 55-56, 60-61, 66-67, 71) that the extension of military jurisdiction over civilians is appropriate in areas where the civil authority has not yet been fully established.

*Third*: It is likewise significant, in endeavoring to ascertain the views of the Founders, that the military exception in the Fifth Amendment does not suggest that the scope of "land and naval Forces" in Clause 14 could properly be broadened by anything in Clause 18. Certainly when the Bill of Rights was passing through the First Congress, the members must have been aware of the discussions of the Necessary and Proper Clause which the ratification process had evoked, and of General Knox's rejected proposal in 1787. But neither they nor the other proponents of Bills of Rights (1 Elliot 323, 326, 328, 334; 2 *id.* 177; 2 *id.* 658; 4 *id.* 243) ever suggested an exception reading "except cases arising in the land and naval forces as that term may hereafter be expanded when from time to time deemed necessary and proper," or couched in equivalent language.

There is no basis in any of the contemporary materials or in any inferences that can properly be drawn from such materials that anyone, in 1787, or 1789, or 1791, ever for a moment considered that the concept of "land and naval Forces" in Clause 14 could be broadened beyond the class

of those then subject to trial by court-martial, viz., those actually in the service, and those few functionally connected civilians who served with them "in the field," i.e., in an area of operations during a period of hostilities.

*Fourth*: The consistent practice, following the adoption of the Constitution, with respect to civilian dependents none of whom appear to have been tried by court-martial at any time prior to 1950 (*supra*, pp. 58-68), a practice primarily formulated by the very military authorities whose jurisdiction was in question, and that was uniformly concurred in by the law officers of the Government, shows that nothing in the Necessary and Proper Clause can enlarge the military amenability of civilian dependents and, correspondingly, withdraw them from the protection of the Sixth Amendment.

The foregoing conclusion follows on any of three independent approaches:

1. A settled authoritative construction of the Constitution, at first contemporaneous with its adoption, and then followed by practice, usage, and acquiescence over a long period is not only of very great weight, but may be well nigh conclusive. E.g., *Stuart* v. *Laird*, 1 Cranch 299, 309; *Murray* v. *Hoboken Land Co.*, 18 How. 272, 279-280; *Burrow-Giles Co.* v. *Sarony*, 111 U.S. 53, 57; *Hampton & Co.* v. *United States*, 276 U.S. 394, 412. Or, as it was phrased with characteristic felicity by Mr. Justice (then Chief Judge) Cardozo, "Not lightly vacated is the verdict of quiescent years." *Coler* v. *Corn Exchange Bank*, 250 N.Y. 136, 141, 164 N.E. 882, 884.

2. In ascertaining who may successfully claim the right of trial by jury, we look to see who, by common understanding, had that right in 1789. See, e.g., *Callan* v. *Wilson*,

127 U.S. 540; *In re Debs*, 158 U.S. 564; *District of Columbia* v. *Colts*, 282 U.S. 63; *District of Columbia* v. *Clawans*, 300 U.S. 617; *Ex parte Quirin*, 317 U.S. 1, 38-41; *Whelchel* v. *McDonald*, 340 U.S. 122, 126-127; *Green* v. *United States*, 356 U.S. 165. As has been shown (pp. 58-68, *supra*) no civilian dependent was ever tried by court-martial prior to 1950, and only two women were ever punished by the military in all that time; one without trial, one with trial, both in the 1790's, and without the approval of the civil authority.

3. In every instance that an attempt to enlarge the scope of military jurisdiction at the expense of trial by jury as it existed in 1789 has come before this Court, that attempt has failed. *Ex parte Milligan*, 4 Wall. 2; *Duncan* v. *Kahanamoku*, 327 U.S. 304; *Toth* v. *Quarles*, 350 U.S. 11; *Reid* v. *Covert*, 354 U.S. 1.

Howsoever the problem is viewed, the same conclusion always follows: Civilian dependents cannot be subjected to trial by court-martial by reason of anything in Clause 14 plus Clause 18 of Section 8 of Article I.

3. *The circumstance that, for more than a century and a half after the ratification of the Constitution, no American military lawyer ever invoked the Necessary and Proper Clause to support peacetime military jurisdiction over civilian dependents is well-nigh conclusive against such a basis for that jurisdiction now.*

"We do not write upon a clean slate." *Green* v. *United States*, 356 U.S. 165, 187; *Lee* v. *Madigan*, 358 U.S. 228, 232; *Abbate* v. *United States*, 359 U.S. 187, 190.

It is therefore impossible to consider the question of military jurisdiction over civilian dependents as a mat-

ter of first impression. That question must be dealt with against a consistent series of rulings by Attorneys General and Judge Advocates General (*supra*, pp. 29-32), all to the effect that military jurisdiction could not constitutionally be exercised over civilians, except in a time of war and at the theater of war, where military operations were in progress. Those rulings were reflected and repeated in the works of recognized military law authorities. Winthrop *146; Davis [a JAG of the Army], *A Treatise on the Military Law of the United States* (3d ed. 1915) 52-53, 478-479; Dudley [Prof. Law, USMA], *Military Law and the Procedure of Courts-Martial* (2d ed. 1908) 413-414.

The Government, which seeks to avoid the settled "in the field" limitation reflected by those authorities (Pet. Br., No. 21, pp. 33, 52-61), never once cites, much less discusses, the consistent series of Opinions of The Judge Advocate General of the Army at variance with its present position, but, as we have said (*supra*, p. 29), deals with the concept of "in the field" as though it were an aberration espoused only by Colonel Winthrop.

In *Reid* v. *Covert*, the Government argued (Appellant's Br., No. 701, Oct. T. 1955, p. 44) that "the world about which Colonel Winthrop wrote no longer exists." Here the Government attempts, primarily by repeated assertion, to demonstrate that Colonel Winthrop's world—which was also the world of numerous Attorneys General and Judge Advocates General—never existed at any time.

Of course that demonstration is facilitated by ignoring contrary precedents, and while a result so reached is hardly persuasive, we are constrained to concede that the Government's technique in thus rewriting history anticipates by precisely a quarter of a century the practices of

"reality control" described in the late George Orwell's *Nineteen Eighty-Four*.[17]

It is hardly necessary to labor the proposition that those are not approaches appropriate either for historical research or for legal arguments.

If we concentrate on, rather than shutting our eyes to, materials that reflect the legal and constitutional thinking of an earlier era, there is—indeed there must be—significance of the highest importance in this incontrovertible fact, that for almost a century after Chief Justice Marshall first demonstrated the far-reaching potentialities of the Necessary and Proper Clause in *M'Culloch* v. *Maryland*, 4 Wheat. 316 (1819), it never occurred to any military man, or indeed to any lawyer, civilian or military, that Clause 18 enlarged the scope of "land and naval Forces" in Clause 14. That revelation was first vouchsafed to Government counsel at the *Covert-Krueger* rehearing in 1957. Supp. Br. for Appellant and Petitioner on Rehearing, Nos. 701 and 713, Oct. T. 1955, pp. 64-82.

Yet neither Colonel Winthrop, nor Colonel Dudley, nor General Davis, nor the successive Judge Advocates General of the Army who formulated and published the opinions that the Government now so pointedly ignores can fairly be charged either with espousing a doctrinaire brand of liberalism, with less than full devotion to the interests and needs of the armed forces, or indeed with uncritical acceptance of any legal views simply because they emanated

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[17] "Day by day and almost minute by minute the past was brought up to date. In this way every prediction made by the Party could be shown by documentary evidence to have been correct; nor was any item of news, or any expression of opinion, which conflicted with the needs of the moment, ever allowed to remain on record. All history was a palimpsest, scraped clean and reinscribed as often as was necessary." P. 41 (1946 ed., Harcourt, Brace & Co.)

from higher authority. Witness, for example, Winthrop's disagreement with judicial opinions not shown to be erroneous until *Toth* v. *Quarles*, 350 U.S. 11 (Winthrop *143-146), and his preference for the concurring opinion in *Ex parte Milligan*, 4 Wall. 2, over the opinion of the Court (Winthrop *1275).

What the court said carried no mandate to the logical faculties of men of their stature. For these were sound, practical, tough-minded lawyers, devoted to the cause of their client, the United States Army, and devoted as well to the principles of the Constitution which they had sworn to support and defend. And it is significant that when, in 1916, Congress at the urging of General Crowder undertook to extend military jurisdiction over civilian dependents beyond the traditional limits, that extension was never sought to be justified on constitutional grounds. Indeed, it remains as the principal mystery of the 1916 revision of the Articles of War that General Crowder, who was the proponent of the jurisdiction now in question, never once mentioned, at any time, either the contrary views of Colonel Winthrop (whom he himself characterized, a few years later, as "the Blackstone of military law") or the contrary views in the 1912 Dig. Op. JAG, that had just recently been published under his supervision.[18]

We do not propose to retrace the legislative history of AW 2(d) of 1916, 1920, or 1948, or of Art. 2(11), UCMJ; that was done in full detail in the briefs in *Reid* v. *Covert*. It is sufficient to summarize the conclusion there documented, which is that Congress was never at any time ad-

[18] In its Brief in Opposition to the Petition for Certiorari in *Stout* v. *Hancock*, 146 F. 2d 741 (C.A. 4), certiorari denied, 325 U.S. 850, the Government pointed out another inadvertence of General Crowder in the course of his testimony on the 1916 Revision. Br. Op., No. 1062, Oct. T. 1944, pp. 18-19, n. 13.

vised, in 1916, or 1949-50, or at any intervening time, even of the existence of a constitutional question with respect to the trial of civilian dependents by court-martial in time of peace; and that, in fact, no issue of constitutionality was ever mooted, much less discussed, in the course of the legislative process on any of those occasions.

Consequently, we submit, it is not helpful in the present context for the Government to exhume the now discredited canard that the jurisdictional provisions of the Uniform Code are not to be questioned since they were enacted only (Pet. Br., No. 21, p. 51) "after full consideration by an eminent committee of experts and by Congress." The less said of the expertise of that committee, the kinder.

Item: Art. 3(a), UCMJ, held unconstitutional in *Toth* v. *Quarles,* 350 U.S. 11.

Item: Arts. 2(4) and 2(6), UCMJ, refused enforcement in *United States* v. *Bledsoe,* 152 F. Supp. 343 (W.D. Wash.), affirmed, 245 F. 2d 955 (C.A. 9). The Government did not seek further review.

Item: Art. 2(11) as originally enacted made applicable to all of Alaska east of long. 172° west—in total and blissful ignorance of *Rassmussen* v. *United States,* 197 U.S. 516.

It would be unnecessarily cruel to add a citation to *Reid* v. *Covert;* rather, in Mark Twain's phrase, we shall draw the curtain of charity over the rest of the scene.

So much for the committee. More to the point is the attitude and outlook of Congress during the hearings and debates on the Uniform Code—where, it cannot be gainsaid, not a word was said by anyone even to intimate that Article 2(11) presented a constitutional doubt, much less that it involved a grave constitutional issue.

It is one thing to urge that the considered constitutional views of a coordinate branch of the Government are entitled to profound respect; it is quite another to insist that a complete and utter disregard of the very existence of a constitutional question is to be similarly treated.

The issue of military jurisdiction over civilian dependents must also be considered against the circumstance that in most of the lower court decisions that on reasoned grounds sustained an extension of military jurisdiction over civilians not traditionally included therein, such extension was rested on the proposition that those were "cases arising in the land or naval forces" within the excepting clause of the Fifth Amendment. E.g., *In re Bogart,* 2 Sawy. 396, Fed. Case No. 1596 (C.C.D. Calif.); *Kronberg* v. *Hale,* 180 F. 2d 128, 130 (C.A. 9), certiorari denied, 339 U.S. 969; *Talbott* v. *United States ex rel. Toth,* 215 F. 2d 22, 26 (D.C. Cir.) (the *Toth* case below). Cf. *Ex parte Falls,* 251 Fed. 415 (D.N.J.).

Otherwise stated, those decisions regarded the Fifth Amendment as a source of power, as a grant of military jurisdiction over all "cases arising in the land or naval forces." Now, plainly enough, the Fifth Amendment was a limitation of power, not a source of power. The Fifth Amendment, together with the balance of the Bill of Rights, was adopted for the sole purpose of limiting power. Yet apparently only Winthrop (*53) was astute enough to make the obvious point that the Fifth Amendment "is rather a *declaratory recognition and sanction* of an existing military jurisdiction than an original provision initiating such a jurisdiction." Not until *Toth* v. *Quarles,* 350 U.S. 11, 14, was it authoritatively established in the decisional law that the Fifth Amendment "does not grant court-martial power to Congress." Every pre-*Toth* discussion of military juris-

diction over civilians, whether in a judicial opinion or elsewhere, must accordingly be read with caution.

The short of the matter is that, if due regard be had to the long history of considered rulings on military jurisdiction over civilian dependents, it is impossible to find in the Necessary and Proper Clause any support for the trials by court-martial of such persons.

The development of the Necessary and Proper Clause has adhered closely to what was foreshadowed for it in Chief Justice Marshall's original exposition (*M'Culloch* v. *Maryland*, 4 Wheat. 316, 421),

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Yet this seminal passage demonstrates precisely why it was that for over a century no one sought in reliance on the Necessary and Proper Clause to enlarge the scope of "land and naval Forces" in Clause 14, and why such an effort must fail today.

To deprive of the right to jury trial a group of civilians who had that right in 1789 and who were never authoritatively sought to be denied it for over a century and a quarter thereafter—

> Is not a legitimate end;
> Is not within the scope of the Constitution;
> Is twice prohibited by the Constitution; and
> Is wholly inconsistent with the spirit of the Constitution.

Indeed, in *Toth* v. *Quarles*, 350 U.S. 11, the Court said (pp. 21-22):

> "None of the other reasons suggested by the Government are sufficient to justify a broad construction of the constitutional grant of power to Congress to regulate the armed forces. That provision itself does not empower Congress to deprive people of trials under Bill of Rights safeguards, and we are not willing to hold that power to circumvent those safeguards should be inferred through the Necessary and Proper Clause."

## III. The Government's Arguments as to the Alleged Necessity of Trying Civilian Dependents by Court-Martial and the Alleged Lack of Acceptable Alternatives Are Incomplete to the Point of Being Misleading.

In this case, the Government incorporates by reference its arguments in *Guagliardo* (U.S. Br., No. 21, pp. 71-82) that "Court-martial jurisdiction over civilian employees and dependents accompanying or serving with the armed forces overseas is a practical necessity," and that (*id.*, pp. 83-101) "There are no acceptable alternatives to the exercise of court-martial jurisdiction."

We shall not burden the Court with a point-by-point refutation of this material, most of which is simply a barely warmed-over version of what was unsuccessfully advanced at the *Covert* rehearing. We shall limit our reply to the obvious omissions in the Government's presentation, omissions so vital and striking that they completely undermine the factual arguments again advanced to support its claim to try civilians by court-martial.

A. *The Government omits to advise the Court that, under the NATO and NATO-type agreements, primary jurisdiction over American civilian dependents has been conceded to the foreign nations where such dependents are stationed.*

Nowhere in any brief filed up to now in connection with the pending four cases does the Government advise the Court that, under existing treaties, the United States has already conceded to the receiving states—i.e., the foreign countries where American troops are stationed—primary jurisdiction over all crimes committed by civilian dependents.

By Art. I(1)(b) of the NATO Status of Forces Agreement, TIAS 2846, 4 U.S.T. 1792, 1794, "civilian component" means a civilian in the employ of an armed service, while Art. I(1)(c) defines "dependent" as the spouse or child of a member of an armed service or of a civilian component (*id.*).

Art. VII (3)(a) and Art. VII (3)(b), 4 U.S.T. at 1800, provides as follows:

> "3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:
>
> "(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to
>
> "(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;
>
> "(ii) offences arising out of any act or omission done in the performance of official duty.

"(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction."

The same arrangement now obtains in Japan. See Par. 3, Amendment of Article XVII of The Administrative Agreement with Japan, TIAS 2648, 4 U.S.T. 1846, 1848.

Otherwise stated, the terms of the existing treaties make it perfectly clear that, in relation to offenses committed by American dependents abroad, the foreign government has primary jurisdiction. That is to say, the United States by solemn international agreements has provided for the very alternative to court-martial jurisdiction in this case that it still insists on representing to this Court as unacceptable.

It is proper to add that the foregoing provisions were quoted at the *Covert* rehearing, and were sought to be replied to by the Government at that time, on the footing that the foreign governments in most instances had waived their primary jurisdiction. See Reply Brief for Appellant and Petitioner on Rehearing, Nos. 701 & 713, Oct. T. 1955, pp. 68-69.

Why the Government still omits to mention treaty provisions so obviously pertinent in the present case of a civilian dependent, is not for us to say.

B. *The Government omits to advise the Court that at least one American civilian dependent has been turned over to the German courts for trial.*

The allegedly unacceptable alternative of trial of American civilian dependents by foreign courts should also be examined in the light of the fact that at least one such dependent, Mrs. Emma Cheaves, was duly turned over to the German courts for trial (*supra*, pp. 55-56).

That instance is significant because, under the German agreements pursuant to which the occupation was terminated in 1955, the German courts were conceded a narrower jurisdiction than those of the NATO countries.

We know of the *Cheaves* case because it appears in a court record in the District of Columbia.

There may have been many more such cases, reflected only in Government records not available to the general public.

At any rate, the circumstance that even a single American civilian woman has been turned over to the German courts for trial, regardless of how such turnover was accomplished, undercuts the Government's present contention that this constitutes an unacceptable alternative.

C. *The Government omits to explain why, after successfully persuading this Court to permit it to turn over the soldier Girard to the Japanese authorities for trial in a Japanese court, the possibility of similar trials in foreign courts for civilian dependents is an "unacceptable alternative."*

In *Wilson* v. *Girard*, 354 U.S. 524, the Government convinced this Court that it was entitled to turn over to the Japanese Government for trial in a Japanese Court, an American soldier, Specialist 3c Girard.

Why, then, it is a "practical necessity" for civilian dependents such as Mrs. Dial to be tried by court-martial, and why would similarly turning over such civilian dependents to foreign courts for trial constitute an "unacceptable alternative"?

That glaring contradiction is not explained in any of the lengthy briefs filed by the Government in these cases.

We do not suggest that the Government at the 1959 Term should or can be estopped by contentions it made at the 1956 Term.

We do urge, however, that since the Government in *Girard* so convincingly demonstrated that national honor and treaty obligation required it to surrender an American soldier to a foreign government for trial in a foreign court, its present arguments that necessity requires American civilians overseas to be tried by court-martial, and that their trial in a foreign court cannot be regarded as an acceptable alternative, fail by a considerable margin to carry conviction.

D. *The Government fails to explain why practical necessities require it to try by court-martial civilian dependents charged with manslaughter and why there are no acceptable alternatives for military trials of such cases, while at the same time the Government has been able, without demonstrable inconvenience, to withhold from trying in a military court civilian dependents charged with premeditated murder.*

"General propositions do not decide concrete cases." Holmes, *J.*, dissenting in *Lochner* v. *New York*, 198 U.S. 45, 76.

Whatever may have been said as an original proposition of the Government's generalized contentions as to practical necessities for, and unacceptable alternatives to, military trials of civilian dependents, the fact is that such dependents have, since *Reid* v. *Covert*, 354 U.S. 1, no longer been subject to trial by court-martial for capital offenses.

The Government neither seeks reconsideration of that decision (Br. 9), nor does it attempt to demonstrate that practical difficulties have resulted in consequence. Instead,

it repeats here the arguments rejected on the earlier occasion, without even a suggestion that there are in actual fact differences between the problem of, on the one hand, a civilian dependent woman who has committed premeditated murder in violation of Art. 118(1), UCMJ, or of a 20 year old dependent youth who has committed rape in violation of Art. 120(a), UCMJ, and, on the other, a woman charged with unpremeditated murder or manslaughter (Arts. 118(2) and 119, UCMJ, respectively), or a similar 20 year old charged with carnal knowledge in violation of Art. 120(b), UCMJ.

Unless such a differentiation is ventured, we can only conclude that its formulation is impossible.

E. *The Court should call on the Government for production of recent arrangements with foreign countries apparently at variance with the representations now made.*

In its brief in *Guagliardo* (Pet. Br., No. 21, pp. 66-71, 75-82), the Government conveys the impression that civilian dependents accompanying our troops abroad live in virtual garrison enclaves that are isolated from the local inhabitants.

That may well be the fact in certain NATO countries.

We have reason to believe that the separateness of the American contingent is less marked in at least some other areas.

The details of the arrangements with Spain (made pursuant to the basic Defense Agreement of Sept. 26, 1953, TIAS 2850, 4 U.S.T. 1895) have not been published, but in a magazine of national circulation it was pointed out that even our military personnel in that country may not wear uniforms off the base, may not establish post exchanges

in the vicinity of large cities, and may not locate establishments near national shrines. See James P. O'Donnell, *The American Invasion of Spain*, in *Saturday Evening Post*, Jan. 28, 1956, p. 26, at p. 88.

Similarly, a new agreement appears to have been negotiated with Germany, which greatly widens the extent to which German law will henceforward apply to American servicemen and their dependents. See *New Legal Era for Troops and Dependents in Germany*, in *Army-Navy-Air Force* REGISTER *& Defense Times*, Aug. 15, 1959, p. 11.

The first of these agreements appears to be classified; the second, we are advised, has been signed but has not yet been ratified, so that its terms have not yet been made public.

None the less, in view of the apparent inconsistency between the terms of the agreements just noted and the factual representations made by the Government in its briefs, we urge that the Court call on the United States to produce those agreements, for the Court's inspection alone, and under restrictions adequate to safeguard such legitimate considerations of secrecy as may exist.

F. *The claim to exercise military jurisdiction over civilian dependents is simply a naked assertion of power.*

The Board of Review in this case, composed of three Army officers, put the claim to try Mrs. Dial by court-martial far more clearly, without material omissions, and without an elaborate background of warmed-over argument.

Said Colonels Bisant, Scott, and Blackmarr (R. 22),

> "* * * we conclude that the necessity for military jurisdiction over dependents charged with non-capital offenses is sufficient to overcome the requirements of Article III and the Fifth and Sixth Amendments."

We commend these gentlemen for their candor, a quality all too infrequently met with in other aspects of the present case.

We urge, however, that this Court discountenance their rewriting of the Constitution, literally by the sword.

## CONCLUSION

The judgment below releasing Mrs. Dial from custody should be affirmed.

Respectfully submitted.

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OCTOBER 1959.

# APPENDIX A

## Short Titles of Works Frequently Cited; Glossary of Military Law Abbreviations.

I. *Short Titles*

Elliot—Elliot's *Debates*.

Farrand—*Farrand, Records of the Federal Convention* (1911).

Heitman—Heitman, *Historical Register and Dictionary of the United States Army* (1903).

Winthrop—Winthrop, *Military Law and Precedents* (2d ed. 1896).

References are given to the original pagination as star pages [*], all of which are marginally noted in the 1920 reprint published by the War Department "for the information of the service."

II. *Military Law Abbreviations*

AGN—Articles for the Government of the Navy (prior to 1951). R.S. §1624; 34 U.S.C. [1946 ed.] §1200.

AW—Articles of War for the year in question, as noted below; those through 1874 are reprinted in Winthrop, *1478-*1537

1775. Res. of June 30, 1775, 2 J. Cont. Cong. 111.

1776. Res. of Sept. 20, 1776, 5 J. Cont. Cong. 788.

1786. Res. of May 31, 1786, 30 J. Cont. Cong. 316.

1806. Act of April 10, 1806, c. 20, 2 Stat. 359.

1874. R.S. §1342.

1916. Sec. 3 of the Act of Aug. 29, 1916, c. 418, 39 Stat. 619, 650.

1920. Ch. II of the Act of June 4, 1920, c. 227, 41 Stat. 759, 787; 10 U.S.C. [1926 through 1946 eds.] §§1471-1593.

1948. Title II of the Act of June 24, 1948, c. 625, 62 Stat. 604, 627; 10 U.S.C. [Supp. II to 1946 ed.] §§1471-1593.

Bull. JAG—Bulletin of The Judge Advocate General of the Army, 1942-1951. A continuation of Supp. I to Dig. Op. JAG, 1912-1940, *infra*.

CMR—Court-Martial Reports. Decisions of Boards of Review and of the Court of Military Appeals since 1951.

Dig. Op. JAG—Digest of Opinions of The Judge Advocate General of the Army. Editions of 1865, 1868, 1868, 1880, 1895, 1901, 1912, 1912-1940, and Supp. I (1941) to the last.

G.O.—General Orders for date and headquarters cited.

MCM—Manual for Courts-Martial. Editions for the Army through 1928; for Army and Air Force in 1949; for all services in 1951.

Op. JAG—Opinions of The Judge Advocate General of the Army, in full; 3 vols., 1917-1919.

UCMJ—Uniform Code of Military Justice. Originally enacted as Act of May 5, 1950, c. 169, 64 Stat. 108; 50 U.S.C. (1952 ed.) §§551-736. Recodified in 1956, effective Jan. 1, 1957, as 10 U.S.C. (1958 ed.) §§801-940.

Committee reports on UCMJ: H.R. Rep. 491, 81st Cong., 1st sess.; Sen. Rep. 486, 81st Cong., 1st sess.

Committee hearings: *Uniform Code of Military Justice*, Hearings before subcommittee of House Committee on Armed Services on H.R. 2498, 81st Cong., 1st sess.; *Uniform Code of Military Justice*, Hearings before subcommittee of Senate Committee on Armed Services on S. 857 and H.R. 4080, 81st Cong., 1st sess.

## APPENDIX B

### Statutes Involved

The constitutional provisions involved are sufficiently set forth at p. 2 of the Government's brief herein; below are conveniently collected all of the American statutory provisions purporting to subject accompanying civilians to military law.

1. Art. XXXII of 1775:

"All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army."

2. Sec. XIII, Art. 23, of 1776:

"All suttlers and retainers to a camp, and all persons whatsoever serving with the armies of the United States in the field, though no inlisted soldier, are to be subject to orders, according to the rules and discipline of war."

3. AW 60 of 1806:

"All sutlers and retainers to the camp, and all persons whatsoever, serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

4. AW 63 of 1874:

"All retainers to the camp, and all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war."

5. AW 2(d) of 1916 through 1948:

"Art. 2. *Persons Subject to Military Law.*—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: * * *

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles; * * *"

6. Art. 2, UCMJ, as originally enacted in 1950:

"Art. 2. Persons subject to the code.

"The following persons are subject to this code: * * *

"(10) In time of war, all persons serving with or accompanying an armed force in the field;

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands; * * *"

7. Art. 2, UCMJ, as recodified in 1956, effective January 1, 1957:

"§*802. Art. 2. Persons subject to this chapter*

"The following persons are subject to this chapter: * * *

"(10) In time of war, persons serving with or accompanying an armed force in the field.

"(11) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons serving with, employed by, or accompanying the armed forces outside the United States and outside the following: that part of Alaska east of longitude 172 degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands."

8. In 1956, Art. 2(11) was amended to include Guam as one of the areas in which that Article would not apply (Sec. 23 of the Act of Aug. 1, 1956, c. 852, 70 Stat. 908, 911), and in 1959, Art. 2(11) was further amended to exclude all of Alaska from its operation (Sec. 6(b) of the Act of June 25, 1959, P.L. 86-70, 73 Stat. 141, 142).

9. Article 118, UCMJ, as revised effective Jan. 1, 1957 (10 U.S.C. §918) reads as follows:

"*§918. Art. 118. Murder*

"Any person subject to this chapter who, without justification or excuse, unlawfully kills a human being, when he—

(1) has a premeditated design to kill;

(2) intends to kill or inflict great bodily harm;

(3) is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life; or

(4) is engaged in the perpetration or attempted perpetration of burglary, sodomy, rape, robbery, or aggravated arson;

is guilty of murder, and shall suffer such punishment as a court-martial may direct, except that if found guilty under clause (1) or (4), he shall suffer death or imprisonment for life as a court-martial may direct."

## APPENDIX C

### Summary of the Punitive Provisions of the Earliest American Military Codes

I. *The 1776 Articles of War as amended in 1786.*

The 1776 Articles were contained in eighteen sections, the fourteenth of which was amended in 1786. As thus amended, there were 107 Articles in all.

Of these, 59 were punitive, and of those 59, 17 were capital. In the compilation that follows, the Section numbers appear in roman numerals, the article numbers in arabic numerals, and "(Cap.)" after the summary indicates a capital offense. Capital offenses are also prefixed by an asterisk.

1. I: 2, disturbing divine service.
2. I: 3, profane cursing.
3. I: 4, absence of chaplain.
4. II: 1, traiterous or disrespectful words.
5. II: 2, contempt towards the general.
*6. II: 3, mutiny (cap.).
*7. II: 4, failure to suppress mutiny (cap.).
*8. II: 5, striking superior officer (cap.).
9. IV: 4, false certificate.
10. IV: 5, false muster.
11. IV: 6, commissary taking money.
12. IV: 7, false muster, particular instance.
13. V: 1, false return.
14. V: 2, failure to make return.
*15. VI: 1, desertion (cap.).
16. VI: 2, absence without leave.

*17. VI: 3, enlisting without prior discharge (cap.).

18. VI: 4, advising desertion.

19. VII: 1, reproachful speeches.

20. VII: 2, challenges.

21. VII: 3, suffering another to fight duel.

22. VII: 4, failure to quell quarrels.

23. VII: 5, upbraiding one who refuses challenge.

24. VIII: 4, exactions by sutler.

25. IX: 1, failure to redress disorder.

26. X: 1, failure to deliver capital offenders to civil magistrate.

27. X: 2, protecting soldiers from creditors.

28. XI: 2, failure to redress soldiers' wrongs.

29. XII: 1, embezzlement of military stores.

30. XII: 2, selling or wasting ammunition.

31. XII: 3, selling, wasting or spoiling other military property.

32. XII: 4, embezzling funds.

33. XIII: 1, absence without leave.

34. XIII 2, lying out of quarters.

35. XIII: 3, failure to retire to quarters.

36. XIII: 4, failure to repair.

37. XIII: 5, officer drunk on guard.

*38. XIII: 6, misbehavior of sentinel (cap.).

39. XIII: 7, hiring of substitute.

40. XIII: 8, conniving at hiring of substitute.

*41. XIII: 9, sounding false alarms (cap.).

42. XIII: 10, quitting platoon or division.

*43. XIII: 11, violence to persons bringing provisions (cap.).

*44. XIII: 12, misbehavior before the enemy (cap.).

*45. XIII: 13, abandoning fort or quitting to pillage (cap.).

*46. XIII: 14, casting away arms and ammunition (cap.).

*47. XIII: 15, disclosing watchword (cap.).

48. XIII: 16, disorderly behavior, causing waste of private property.

*49. XIII: 17, forcing safeguard (cap.).

*50. XIII: 18, relieving the enemy (cap.).

*51. XIII: 19, correspondence with the enemy (cap.).

*52. XIII: 21, leaving to plunder (cap.).

*53. XIII: 22, compelling commander to surrender (cap.).

54. XIV: 12 (1786), disturbing proceedings of court-martial.

55. XIV: 14 (1786), breach of arrest.

56. XIV: 18 (1786), permitting prisoner to escape.

57. XIV: 19 (1786), provost marshal failing to render report.

58. XIV: 20 (1786), conduct unbecoming officer and gentleman.

59. XVIII: 5, general article.

II. *The 1806 Articles of War*

The 1806 articles were 101 in number, not divided into sections, but numbered consecutively. Sec. 2 of the enacting statute denounced spying as a capital offense.

There were 56 punitive provisions, of which 16 were capital.

The designations below follow those in Part I.

1. AW 2, disturbing divine service.

2. AW 3, profane cursing.
3. AW 4, absence of chaplain.
4. AW 5, contemptuous words against superior civil authority.
5. AW 6, contempt or disrespect towards commanding officer.
*6. AW 7, mutiny (cap.).
*7. AW 8, failure to suppress mutiny (cap.).
*8. AW 9, striking superior officer (cap.).
9. AW 14, false certificate.
10. AW 15, false muster.
11. AW 16, commissary taking money.
12. AW 17, false muster, particular instance.
13. AW 18, false return.
14. AW 19, failure to make return.
*15. AW 20, desertion (cap.).
16. AW 21, absence without leave.
*17. AW 22, enlisting without prior discharge (cap.).
*18. AW 23, advising desertion (cap.).
19. AW 24, reproachful speeches.
20. AW 25, challenges.
21. AW 26, suffering another to fight a duel.
22. AW 27, failure to quell quarrels.
23. AW 28, upbraiding one who refuses a challenge.
24. AW 31, exactions by sutler.
25. AW 32, failure to redress disorders.
26. AW 33, failure to deliver capital offenders to civil magistrate.

27. AW 35, failure to redress soldiers' wrongs.
28. AW 36, embezzlement of military stores.
29. AW 37, selling or wasting ammunition.
30. AW 38, selling, wasting or spoiling other military property.
31. AW 39, embezzling funds.
32. AW 41, absence without leave.
33. AW 42, lying out of quarters.
34. AW 43, failure to retire to quarters.
35. AW 44, failure to repair.
36. AW 45, officer drunk on guard.
*37. AW 46, misbehavior of sentinel (cap.).
38. AW 47, hiring of substitute.
39. AW 48, conniving at hiring of substitute.
*40. AW 49, sounding false alarms (cap.).
41. AW 50, quitting platoon or division.
*42. AW 51, violence to persons bringing provisions (cap.).
*43. AW 52, misbehavior before the enemy (cap.).
*44. AW 53, disclosing watchword (cap.).
45. AW 54, disorderly behavior, causing waste of private property.
*46. AW 55, forcing safeguard (cap.).
*47. AW 56, relieving the enemy (cap.).
*48. AW 57, correspondence with the enemy (cap.).
*49. AW 59, compelling commander to surrender (cap.).
50. AW 76, disturbing proceedings of court-martial.
51. AW 77, breach of arrest.

52. AW 81, suffering prisoner to escape.
53. AW 82, provost marshal failing to render report.
54. AW 83, conduct unbecoming officer and gentleman.
55. AW 99, general article.
*56. Sec. 2, spying (cap.).